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No. 08-897 JAN 12 2009

In The
Supreme Court of the United States

COUNTY OF SAN BERNARDINO and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,
Petitioners,

v.

STATE OF CALIFORNIA, SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES, 1 through 50, inclusive,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeals Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do California's Compassionate Use Act and Medical Marijuana Program conflict with the Controlled Substances Act, and are they therefore barred under the doctrine of federal preemption?

PARTIES TO THE PROCEEDING

Petitioners: County of San Bernardino ("San Bernardino") and its Sheriff Gary Penrod ("Penrod").

Respondents: State of California ("California") and the Director of its Department of Health Services, Sandra Shewry ("Shewry").

Plaintiff and Appellant below: County of San Diego ("San Diego").

Defendants and Respondents below: San Diego NORML ("NORML"), a non-governmental entity.

Interveners and Respondents below: Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana, and Americans for Safe Access, a non-governmental entity (collectively referred to as "Intervenors").

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of Division One of the California Fourth District Court of Appeal is reported at 165 Cal.App.4th 798, see also App. 1a. The order of the California Supreme Court denying Petitioners' petition for review appears at App. 64a. The Superior Court's judgment is unpublished and appears at App. 45a.

JURISDICTION

The California Supreme Court denied review of this case on October 16, 2008. (App. 64a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. (App. 65a-135a.)

STATEMENT OF THE CASE

The current federal laws controlling the use and possession of marijuana were enacted in 1970 with Congress' passage of the Controlled Substances Act ("CSA"), 21 U.S.C. § 801, et seq. Title II of the CSA categorizes drugs into five "schedules" which are determined by the drugs' potential for abuse, the drugs' medical uses, and the lack of accepted safety for the drugs' use under medical supervision. 21 U.S.C. § 812. Under the CSA, marijuana is classified as a Schedule I drug, the most restrictive category, which makes it a criminal offense to manufacture, distribute, or possess. 21 U.S.C. §§ 823(f), 841(a)(1), and 844(a);

see also *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490 (2001).

In November 1996, California voters passed Proposition 215 legalizing the medical use of marijuana. The proposition exempted patients and their caregivers from criminal liability for the cultivation and/or possession of marijuana for personal use based on a physician's recommendation. Proposition 215 was codified under California Health and Safety Code section 11362.5, and is known as the Compassionate Use Act ("CUA").

Under subsequent legislation known as the Medical Marijuana Program ("MMP"), Cal. Health & Saf. Code, § 11362.7, et seq., the California Legislature enacted a system for qualified individuals to be given an identification card. Authorized possession of such cards exempts holders from arrest and/or criminal prosecution for the cultivation and/or possession of limited amounts of marijuana. Cal. Health & Saf. Code, §§ 11362.71(e); 11362.765(a). The MMP further allows that under certain circumstances, authorized card holders incarcerated in a county jail may be permitted access to and use of medical marijuana. Cal. Health & Saf. Code, § 11362.785. Application of the MMP also extends to parolees. Cal. Health & Saf. Code, § 11362 .795.

Given the apparent conflict between California's medical marijuana laws and the CSA, a number of challenges have arisen in the courts, several of which have been addressed by this Court and the Ninth Circuit Court of Appeals. *U.S. v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Raich v. Gonzales*, 500 F.3d 850

(9th Cir. 2007). Significantly, the *Oakland Cannabis Buyers' Cooperative*, *Raich*, and the Ninth Circuit's subsequent *Raich* decisions all dealt with injunctive relief, and none of the cases directly addressed whether California's medical marijuana laws are preempted by the CSA and are therefore unconstitutional.

On February 8, 2006, San Bernardino and Penrod filed their complaint (App. 147a) in the present action, challenging the constitutionality of California's medical marijuana laws. On March 30, 2006, the matter was consolidated with a previous action filed by San Diego (App. 136a), and was ultimately joined by the County of Merced and its Sheriff, and Intervenors.

As the dispute presented only issues of law, the parties agreed to file cross-motions for judgment on the pleadings, and established a briefing schedule in conjunction with the Superior Court. The parties' motions came to hearing on November 16, 2006, at which time the Superior Court released its tentative decision in favor of the State, NORML, and Intervenors. The Superior Court's tentative decision was adopted, and ultimately incorporated into the judgment (the "Judgment"; App. 45a), which is the subject of this petition.

San Diego, San Bernardino and Penrod appealed the Judgment, and on July 31, 2008, Division One of the California Fourth District Court of Appeal released its opinion in this matter, *County of San Diego v. San Diego NORML*, 165 Cal.App.4th 798 (2008) ("*San Diego*"), affirming the Judgment. San Bernardino and Penrod, and San Diego separately petitioned the California Supreme Court for review of the Court of

Appeal's decision, and on October 16, 2008, the California Supreme Court summarily denied review. (App. 64a.)

REASONS FOR GRANTING THE PETITION

Although this Court has considered California's medical marijuana laws on two prior occasions, the underlying constitutionality of those laws remains undetermined. Most recently, this Court denied review of *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007)[1], in which a California court ordered the return of medical marijuana to its owner. The *Garden Grove* case, however, did not present a direct challenge to the constitutionality of California's medical marijuana laws, for as stated by the *Garden Grove* court:

> The City here invokes the preemption doctrine, but not by asking us to declare the CUA and MMP unconstitutional across the board, nor by challenging the right of Californians to use marijuana for medicinal reasons. Rather, it urges us to find the federal drug laws preempt state law to the extent state law authorizes the return of medical marijuana to qualified users. *City of Garden Grove, supra,* at p. 381.

The Garden Grove court acknowledged the limited nature of its ruling in stating:

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[1] The City of Garden Grove's petition for writ of certiorari, Docket No. 07-1569, was denied by this Court on December 1, 2008.

> In fact, our holding with respect to the preemption issue presented in this case is very narrow. All we are saying is that federal supremacy principles do not prohibit the return of marijuana to a qualified user whose possession of the drug is legally sanctioned under state law. *City of Garden Grove, supra,* at p. 386.

Unlike *Garden Grove*, this case deals directly with the question of federal preemption. Even the *Garden Grove* court recognized that the present action more fully presents the issue of federal preemption of California's medical marijuana laws:

> The broader issue of whether federal law generally preempts California's medical marijuana laws is, as we have explained, not before us. However, we note that last year a Superior Court judge in San Diego rejected a sweeping challenge to the CUA and MMP on preemption grounds. (See County of San Diego v. San Diego NORML, case Nos. GIC860665 & GIC861051.) That decision is currently being appealed to our colleagues in Division One. *City of Garden Grove, supra,* at fn. 11.

This Court has yet to directly rule whether California's medical marijuana laws are preempted by federal law and are therefore unconstitutional. The question raised in this case, unlike *Garden Grove*, addresses that ultimate issue: do the CUA and MMP conflict with the CSA, and are California's medical marijuana laws therefore barred under the doctrine of federal preemption?

A. CALIFORNIA'S MEDICAL MARIJUANA LAWS ARE PREEMPTED AND RENDERED UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE.

California may be within its rights to decriminalize medical marijuana under state law if it so desires. *Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal.4th 920, 926 (2008) (". . . California voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes [the CUA and MMP]"). The problem arises when, having acknowledged that possession of medical marijuana is no longer a state crime, California enacts a series of laws which thwart federal law. The various portions of the California Health and Safety Code which provide for the identification of medical marijuana users and permit possession of limited amounts of the drug (e.g., see Cal. Health & Saf. Code, §§ 11362.7, et seq.) fly squarely in the face of federal law which bans possession of marijuana for *any purpose*. The situation is further aggravated when California courts mandate the return of medical marijuana to State-authorized users. See *City of Garden Grove v. Superior Court*, *supra;* see also San Bernardino's and Penrod's Request for Judicial Notice in support of Demurrer Opposition. (App. 185a.)

Attempting to circumvent this point, the Court of Appeal in this case stated:

> We conclude the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA. The purpose of the CSA is to combat recreational drug use, not

> to regulate a state's medical practices. (Citation.) *San Diego, supra,* at pp. 826-827. (App. 35a.)

What the Court of Appeal missed is the fact that the federal government *does* regulate the medical use of controlled substances, particularly when a substance classified in Category I of the CSA, such as marijuana, is deemed by Congress to have *no medical use.* For example, in *U.S. v. Oakland Cannabis Buyers' Co-op., supra,* this Court found that:

> In the case of the Controlled Substances Act, the statute reflects a determination that ***marijuana has no medical benefits worthy of an exception*** (outside the confines of a Government-approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, see 21 U.S.C. § 829, the same is not true for marijuana. ***Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use" at all.*** § 812. *Oakland Cannabis Buyers' Co-op, supra,* 532 U.S., at p. 491; italics added; see also *Gonzales v. Raich, supra,* 545 U.S. 1, 26-29.

Ignoring the fact that the federal government has deemed marijuana to have no medical use, the Court of Appeal next concluded that the CSA does not regulate state medical practices. In this regard, the Court of Appeal found that:

> The identification card statutes impose no significant *added* [original italics] obstacle to the purposes of the CSA not otherwise inherent

> in the provisions of the exemptions that Counties do not have standing to challenge, and we therefore conclude the limited provisions of the MMP that Counties *may* [original italics] challenge are not preempted by principles of obstacle preemption. *San Diego, supra,* at p. 827. (App. 35a-36a.)

The Court of Appeal implicitly recognized the obstacle to the CSA which California's authorization to possess medical marijuana poses, but avoided the issue by reverting to its position that San Bernardino, Penrod, and San Diego have no standing to raise the core issue of federal preemption under the Supremacy Clause.

Finally, the Court of Appeal noted:

> We conclude that even if Congress intended to preempt state laws that present a significant obstacle to the CSA, the MMP identification card laws are not preempted. *San Diego, supra,* at p. 828. (App. 38a.)

The Court of Appeal's preemption analysis and conclusion ignore well-established precedent. As the California Supreme Court has noted:

> Conflict preemption does not require a direct contradiction between state and federal law; the ***state law is preempted if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress***. *Doukal v. Smithkine Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 929, quoting *English v. General*

Electric Co., 496 U.S. 72, 79 (1990); italics added.

Similarly, this Court has found:

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . . ***[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.*** (*Free v. Bland*, 369 U.S. 663, 666 (1962); italics added.)

The Court of Appeal's interpretation of the relationship between California's medical marijuana laws and the CSA thus results in an impermissible subordination of federal law:

> [U]nder the Supremacy Clause of the United States Constitution, the state is required to treat federal law on a parity with state law, and thus it ***is not entitled to relegate violations of federal law or policy to second-class citizenship.*** (See *Claflin v. Houseman*, 93 U.S. 130, 136-37, 23 L.Ed. 833 (1876).) *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 277 F.3d 936, 942 (7th Cir. 2002); italics added.

It may be said that a fundamental error underlying the decisions of the Superior and Appellate Courts in this case is their acceptance of the position that California's medical marijuana laws do not require violation of the CSA. However, while California law may not *require* violation of the CSA, it certainly

encourages if not facilitates the CSA's violation. California's medical marijuana laws condone the use, possession, and cultivation of marijuana for medical purposes. Further, California law provides what literally amounts to "get-out-of-jail-free" cards to qualified medical marijuana users. Cal. Health & Saf. Code, §§ 11362.765 and 11362.775. As long as California's medical marijuana laws permit the possession of a substance banned under the CSA, a conflict exists.

It has been argued that the only applicable test to determine the medical marijuana laws' constitutionality in light of the Supremacy Clause is the "positive conflict" provision of 21 U.S.C. § 903. Citing Justice Scalia's dissent in *Gonzales v. Oregon*, 546 U.S. 243 (2006), observing that Oregon's euthanasia law does not require violation of the CSA, California and the Intervenors argue that for a positive conflict to exist, California's medical marijuana laws must compel the violation of the CSA. San Bernardino and Penrod, however, maintain that such an interpretation of 21 U.S.C. § 903 imposes too stringent a standard for the determination of a conflict.

As San Diego aptly noted in oral argument during the Superior Court's hearing on the cross-motions for judgment on the pleadings, the law imposes no particular significance to the term "positive conflict" as it is used in 21 U.S.C. § 903. As counsel noted, there is no "negative conflict" with which to contrast a positive conflict, nor does the law explain exactly what a positive conflict may be. (App. 577a-578a.) In effect, the positive conflict language found in section 903 and other federal statutes simply displays the intent of

Congress not to occupy the field to the exclusion of state regulation which is not otherwise inconsistent with federal law. *Southern Blasting Services, Inc. v. Wilkes County*, 288 F.3d 584, 590 (2002).

> The "direct and positive conflict" language in 18 U.S.C. § 848 simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that "compliance with both federal and state regulations is a physical impossibility." *Hillsborough*, 471 U.S. at 713, 105 S.Ct. 2371[2] (internal quotation omitted). Indeed, § 848 explains that in order for a direct and positive conflict to exist, the state and federal laws must be such that they "cannot be reconciled or consistently stand together." 18 U.S.C. § 848. *Southern Blasting Services, supra*, at p. 591.

Moreover, this Court has interpreted the Supremacy Clause to require that:

> [E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976).

Indeed, the paramount importance of the CSA was emphasized by this Court *in Gonzales v. Raich*:

> Given the enforcement difficulties that attend distinguishing between marijuana

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[2] *Hillsborough County v. Automated Laboratories, Inc.*, 471 U.S. 707 (1985).

> cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, ***we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA*** . . . That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); italics added.

Whether under the line of cases finding preemption because of impossibility to comply with both state and federal requirements, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), or under cases finding preemption where state law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Kelly v. State of Washington, ex rel. Foss Co.*, 302 U.S. 1 (1937), California's medical marijuana laws are clearly preempted by the CSA.

Since the Court of Appeal failed to properly apply state and federal precedent finding federal preemption where state law stands as an obstacle to the enforcement of federal law, review by this Court is necessary to correct the Court of Appeal's error on a matter of significant public importance, and to prevent the threatened erosion of the CSA which the California courts appear to be fostering.

B. FEDERAL PREEMPTION OF CALIFORNIA'S MEDICAL MARIJUANA LAWS DOES NOT CONSTITUTE A VIOLATION OF THE TENTH AMENDMENT.

The Court of Appeal misconstrued the commandeering doctrine of *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992) in concluding that there is no federal preemption of California's medical marijuana laws. The Court of Appeal stated, "... Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws," and went on to quote *Printz v. United States*, where this Court stated:

> Today we hold that Congress cannot circumvent that prohibition [the Tenth Amendment] by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. (*Printz, supra*, at p. 935.)

This Court has rejected the contention that the Tenth Amendment limits Congressional power to preempt or displace state regulation of private activities affecting interstate commerce, and has proclaimed:

> A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict

> with federal law. [Citations.] ***Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all--and not just inconsistent--state regulation of such activities.*** [Citations.] ***Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.*** [Citations.] *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981); italics added.)

Indeed, there can be no Tenth Amendment violation where Congress acts under one of its enumerated powers and also because the CSA does not trigger application of the commandeering doctrine. As most recently held by the Ninth Circuit in *Raich v. Gonzales, supra*:

> Generally speaking, however, a power granted to Congress trumps a competing claim based on a state's police powers. "The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981); see also *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000) ("***We have held that if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment.***").

> The Supreme Court held in *Gonzales v. Raich* that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act. See 125 S.Ct. at 2215. Thus, after *Gonzales v. Raich*, ***it would seem that there can be no Tenth Amendment violation in this case. Raich concedes that recent Supreme Court decisions have largely foreclosed her Tenth Amendment claim, and she also concedes that this case does not implicate the "commandeering" line of cases.*** (Fn. omitted.) *Raich, supra,* 500 F.3d, at p. 867; italics added.

The upshot of the case law set forth above is that the CSA does not violate the Tenth Amendment since it does not impermissibly commandeer state regulatory powers.

C. SAN BERNARDINO AND PENROD HAVE THE REQUISITE STANDING TO CHALLENGE CALIFORNIA'S MEDICAL MARIJUANA LAWS.

The issue of standing has been present throughout this case, and has been raised at every step of the litigation. The primary question has focused on the ability of San Bernardino and San Diego, as political subdivisions of California, and Penrod, as an elected official, to challenge the constitutionality of California's medical marijuana laws.

While the Superior Court had little difficulty finding standing on the part of San Bernardino and Penrod, and addressed the merits of the case, the Court of Appeal utilized the standing issue to limit its analysis and avoid the substantive question of whether California's medical marijuana laws violate the Supremacy Clause. The Court of Appeal narrowed the scope of its scrutiny solely to the impact which the MMP's ID card system may have on counties and law enforcement agencies. By this means the Court of Appeal avoided directly confronting the underlying constitutionality of the CUA and MMP, and in doing so ignored California case law precedent. By limiting standing, the Court of Appeal also ruled contrary to its sister court in *City of Garden Grove v. Superior Court, supra,* which found standing to exist if for no other reason than the public importance of the issue presented. Counties and law enforcement officers need this Court's guidance on the significant and timely federal question now squarely before it.

Under California law, the California Supreme Court's decision in *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1 (1986), confers standing on counties and other political subdivisions of the state to challenge the constitutionality of state law under the Supremacy Clause.

In *Star Kist*, the California Supreme Court recognized that situations may arise when unconstitutional state laws are best challenged by the political subdivisions most directly affected.

> Viewing the commerce clause challenge in this light leads to the conclusion that political subdivisions might legitimately raise such

> claims. ***State action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed.*** In the present case, for example, there is a real possibility that the constitutionality of the Legislature's scheme of differential taxation of business inventories would have gone unchecked absent challenge by those entities charged with administration of the program. Moreover, because the foreign commerce exception precluded the local taxing agencies from taxing business inventories they otherwise would have been authorized to tax, the agencies experienced significant revenue loss. (Fn. omitted.) ***Thus, their interest in testing the constitutionality of the statute is unmistakable.*** *Star-Kist Foods, supra,* at p. 9; italics added.

The *Star-Kist* ruling has been followed by California courts, which have consistently upheld the standing of subordinate public agencies to challenge the constitutionality of state laws. E.g., see *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 673-674 (2006), and most recently, *City of Garden Grove v. Superior Court*, *supra*.

Notably, the *Garden Grove* decision made no attempt to limit the city's standing, and in that respect, conflicts with the Court of Appeal's ruling in the present case. Even more importantly, the *Garden Grove* court recognized that law enforcement's return of seized medical marijuana to its owners constituted a significant issue of public concern sufficient to provide the City of Garden Grove with standing to

pursue its challenge of California's medical marijuana laws. *City of Garden Grove, supra,* at p. 365.

Viewed in the most simplistic terms, California's medical marijuana laws permit the possession of a substance banned under federal law. Not only do California's medical marijuana laws permit possession of federal contraband, but as is evident in *Garden Grove,* they require the obstruction, if not violation, of federal law by compelling local law enforcement to return confiscated medical marijuana to its users. Thus, the apparent obstruction of the CSA by courts ordering the return of federal contraband to its users should be an adequate basis to convey standing on any agency or person charged with implementation or enforcement of the law.

San Bernardino and Penrod believe that, notwithstanding the Court of Appeal's limitation on their standing, adequate standing exists under *Star-Kist* and *Garden Grove* for them to pursue the present challenge to California's medical marijuana laws.

Under federal law, an issue arises whether standing exists for political subdivisions, such as San Bernardino and San Diego, to challenge the constitutionality of California's laws. The Ninth and Sixth Circuit Courts of Appeals follow a per se rule prohibiting political subdivisions from challenging the laws of their parent states. *City of South Lake Tahoe v. Calif. Tahoe Regional Planning Agency,* 625 F.2d 231 (9th Cir. 1980); *Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104 (9th Cir. 1999); *Gwinn Area Community Schools v. Michigan,* 741 F.2d 840 (6th Cir. 1984). However, other circuits limit that rule by granting standing to political subdivisions which

question the constitutionality of state legislation under the Supremacy Clause. *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir. 1979); *Branson School Dist. RE-82 v. Rome,* 161 F.3d 619 (10th Cir. 1998); see also Brian P. Keenan, Subdivisions, Standing, and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?, 103 Mich.L.Rev. 1899, 1902 (2005).

San Bernardino and Penrod submit that the *Rogers* and *Branson* cases provide the better reasoned approach in that Supremacy Clause challenges, by their nature, seek to require that states act within a constitutional framework and comply with constitutional provisions and valid federal laws.

Further, this Court has granted standing to petitioners who would otherwise have no standing under the Ninth and Sixth Circuits' per se rationale:

> When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 623-624 (1989).

For these reasons, San Bernardino and Penrod urge this Court to acknowledge the more permissive standing rule relating to legal challenges under the Supremacy Clause by political subdivisions, and

recognize as did Division Three of the California Fourth District Court of Appeal in *Garden Grove*, that:

> These considerations militate strongly in favor of granting the City standing. (Citations.) ***So does the fact that this case implicates constitutional concerns respecting the relationship between state and federal law. Courts have recognized that, consistent with our federalist system of government, state political subdivisions should be given standing to invoke the supremacy clause to challenge a state law on preemption grounds***. (Citations.) Standing is also favored if an interested party may otherwise find it difficult or impossible to challenge the decision at issue. (Citation.) And here it appears quite likely that the City will not be able to obtain judicial review of the trial court's order unless it is afforded standing in this proceeding. For all of these reasons, we conclude the City has standing to challenge the trial court's order. (*City of Garden Grove, supra,* 157 Cal.App.4th, at pp. 370-371; italics added.)

San Bernardino and Penrod request that this Court recognize their standing to raise a very important federal question which impacts all counties and law enforcement agencies in California so that this case can be decided on the merits concerning federal preemption of California's medical marijuana laws.

CONCLUSION

For the foregoing reasons, the Judgment and decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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Dated: January 12, 2009

APPENDIX

APPENDIX A

COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

No. D050333

[Filed July 31, 2008]

COUNTY OF SAN DIEGO,
Plaintiff and Appellant,

v.

SAN DIEGO NORML et al.,
Defendants and Respondents;

WENDY CHRISTAKES et al.,
Interveners and Respondents.

COUNTY OF SAN BERNARDINO et al.,
Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA et al.,
Defendants and Respondents;

WENDY CHRISTAKES et al.,
Interveners and Respondents.

COUNSEL: John J. Sansone, County Counsel, Thomas D. Bunton and C. Ellen Pilsecker, Deputy County Counsel, for Plaintiff and Appellant County of San Diego.

Ruth E. Stringer, County Counsel, Alan L. Green, Charles J. Larkin and Dennis Tilton, Deputy County Counsel, for Plaintiffs and Appellants County of San Bernardino and Gary Penrod.

American Civil Liberties Union Foundation, Adam B. Wolf, Allen Hopper; ACLU of San Diego & Imperial Counties and David Blair-Loy for Defendants and Respondents San Diego NORML, Wo/Men's Alliance for Medical Marijuana and Dr. Stephen O'Brien.

Edmund G. Brown, Jr., Attorney General, Christopher E. Krueger, Assistant Attorney General, Jonathan K. Renner and Peter A. Krause, Deputy Attorneys General, for Defendants and Respondents State of California and Sandra Shewry.

Americans for Safe Access and Joseph D. Elford for Interveners and Respondents Wendy Christakes, Norbert Litzinger, William Britt, Yvonne Westbrook and Americans for Safe Access.

JUDGES: Opinion by McDonald, Acting P. J., with O'Rourke and Irion, JJ., concurring.

OPINION

McDONALD, Acting P. J.

In 2003, the California Legislature enacted the Medical Marijuana Program Act. (Health & Saf. Code,

§§ 11362.7-11362.9; hereafter MMP.)[1] Among other provisions, the MMP imposed on counties the obligation to implement a program permitting a limited group of persons--those who qualify for exemption from California's statutes criminalizing certain conduct with respect to marijuana (the exemptions)--to apply for and obtain an identification card verifying their exemption.

In this action, plaintiffs County of San Diego (San Diego) and County of San Bernardino (San Bernardino) contend that, because the federal Controlled Substances Act (21 U.S.C. §§ 801-904; hereafter CSA) prohibits possessing or using marijuana for any purpose, certain provisions of California's statutory scheme are unconstitutional under the supremacy clause of the United States Constitution. San Diego and San Bernardino (together Counties) did not claim below, and do not assert on appeal, that the exemption from state criminal prosecution for possession or cultivation of marijuana provided by California's Compassionate Use Act of 1996 (§ 11362.5; hereafter CUA) is unconstitutional under the preemption clause. Instead, Counties argue the MMP is invalid under preemption principles, arguing the MMP poses an obstacle to the congressional intent embodied in the CSA.

The trial court below rejected Counties' claims, concluding the MMP neither conflicted with nor posed an obstacle to the CSA. On appeal, Counties assert the trial court applied an overly narrow test for

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[1] All statutory references are to the Health and Safety Code unless otherwise specified.

preemption, and the MMP is preempted as an obstacle to the CSA. We conclude Counties have standing to challenge only those limited provisions of the MMP that impose specific obligations on Counties, and may not broadly attack collateral provisions of California's laws that impose no obligation on or inflict any particularized injury to Counties. We further conclude, as to the limited provisions of the MMP that Counties *may* challenge, those provisions do not positively conflict with the CSA, and do not pose any added obstacle to the purposes of the CSA not inherent in the distinct provisions of the exemptions from prosecution under California's laws, and therefore those limited provisions of the MMP are not preempted. We also reject San Bernardino's claim that the identification card provisions of the MMP are invalid under the California Constitution.

I

THE STATUTORY FRAMEWORK

A. *California Law*

The CUA

In California, marijuana is classified as a schedule I controlled substance (see § 11054, subd. (d)(13)), and its possession is generally prohibited. However, when California voters adopted the CUA, California adopted an exemption from state law sanctions for medical users of marijuana. The CUA, codified in section 11362.5, provides:

"(b)(1) The people of the State of California hereby find and declare that the purposes of the [CUA] are as follows:

"(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

"(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

"(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having

recommended marijuana to a patient for medical purposes.

"(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

"(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

The MMP

In 2003, the Legislature enacted the MMP to "address issues not included in the CUA." (*People v. Wright* (2006) 40 Cal.4th 81, 85 [51 Cal. Rptr. 3d 80, 146 P.3d 531].) Among the MMP's purposes was to "'facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.'" (40 Cal.4th at p. 93.) To that end, the MMP included provisions establishing a voluntary program for the issuance of identification cards to persons qualified to claim the exemptions provided under California's medical marijuana laws. (§§ 11362.7, subd. (f), 11362.71.) Participation in the identification card program, although not mandatory, provides a significant benefit to its participants: they

are not subject to arrest for violating California's laws relating to the possession, transportation, delivery or cultivation of marijuana, provided they meet the conditions outlined in the MMP. (§ 11362.71, subd. (e).)

Although the bulk of the provisions of the MMP confer no rights and impose no duties on counties,[2] one set of provisions under the MMP--the program for issuing identification cards to qualified patients and primary caregivers--does impose certain obligations on counties. (§ 11362.71 et seq.) Under the identification card program, the California Department of Health Services is required to establish and maintain a program under which qualified applicants may voluntarily apply for a California identification card identifying them as qualified for the exemptions; the program is also to provide law enforcement a 24-hour a day center to verify the validity of the state

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[2] For example, the MMP's exemptions encompass a broad list of specified drug offenses from which qualified patients and primary caregivers would be immune. The MMP provides that exempt persons would not "'be subject, on that sole basis, to criminal liability under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance].' (§ 11362.765, subd. (a).)" (*People v. Wright*, *supra*, 40 Cal.4th at p. 93.) The MMP also contains definitional provisions for those entitled to the protections of the MMP (§ 11362.7), imposes obligations on applicants and holders of identification cards (§§ 11362.715, 11362.76, 11362.77, 11362.81), and contains several other miscellaneous provisions.

identification card. (§ 11362.71, subd. (a).) The MMP requires counties to provide applications to applicants, to receive and process the applications, verify the accuracy of the information contained on the applications, approve the applications of persons meeting the state qualifications and issue the state identification cards to qualified persons, and maintain the records of the program. (§§ 11362.71-11362.755.)

The identification card program is voluntary and a person need not obtain an identification card to be entitled to the exemptions provided by state law. (§ 11362.765, subd. (b); *People v. Wright, supra*, 40 Cal.4th at pp. 93-94 [the MMP applies to both cardholders and noncardholders].)

B. *Federal Law--the CSA*

The CSA provides it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice ... ." (21 U.S.C. § 844(a).) The exception regarding a doctor's prescription or order does not apply to any controlled substance Congress has classified as a schedule I drug (see 21 U.S.C. § 812(c)), including marijuana. (*Gonzales v. Raich* (2005) 545 U.S. 1, 14-15 [162 L. Ed. 2d 1, 125 S. Ct. 2195].) Schedule I drugs are so categorized because they have (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use under medical supervision. (21 U.S.C. § 812(b)(1).)

Possession of marijuana for personal use is a federal misdemeanor. (21 U.S.C. § 844a(a).) The legislative intent of Congress to preclude the use of marijuana for medicinal purposes is reflected in the statutory scheme of the CSA:[3] "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. [Citations.]" (*Gonzales v. Raich, supra*, 545 U.S. at p. 14.)

Although the use of marijuana for medical purposes has found growing acceptance among the states (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 643 [noting "Alaska, Arizona, Colorado, Maine, Nevada, Oregon and Washington ... have followed California in enacting medical marijuana laws by voter initiative"]), marijuana remains generally prohibited under the CSA. (*Conant*, at p. 640; *Gonzales v. Raich, supra*, 545 U.S. at p. 15, fn. 23 [efforts to reclassify marijuana to permit medicinal uses have been unsuccessful].)

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[3] Counties also note the United States is a party to a treaty, the Single convention on narcotic drugs, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298 (see 21 U.S.C. § 801(7)), which includes prohibitions on marijuana. However, this treaty is not self-executing, and Counties do not explain how the treaty lends any added weight to the preemption questions presented here.

II

PROCEDURAL BACKGROUND

In 2006 San Diego filed a complaint against the State of California and Sandra Shewry, in her former capacity as Director of the California Department of Health Services (together State), as well as the San Diego chapter of the National Organization for the Reform of Marijuana Laws (NORML). San Diego's complaint alleged it had declined to comply with its obligations under the MMP and NORML had threatened to file suit against San Diego for its noncompliance. Accordingly, San Diego sought a judicial declaration that it was not required to comply with the MMP, arguing the entirety of the MMP and the CUA (except for § 11362.5, subd. (d)) was preempted by federal law. San Bernardino filed its suit raising the same preemption claims, and its complaint was subsequently consolidated with that of San Diego. The County of Merced intervened in San Diego's action and alleged, as an additional ground for relief, that the MMP was invalid because it amended the CUA in violation of article II, section 10, subdivision (c) of the California Constitution.[4] Additional parties, composed of medical marijuana patients and others qualified for exemptions under the CUA and MMP, also intervened in the action.

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[4] County of Merced is not a party to this appeal and its complaint in intervention is not part of the record on appeal. However, we grant State's unopposed motion for judicial notice of County of Merced's complaint in intervention.

State demurred to Counties' complaints, alleging in part that Counties did not have standing to prosecute the claims, but its demurrer was overruled. The parties subsequently filed cross-motions for judgment on the pleadings, which were consolidated for hearing in November 2006. The court ruled the CUA and MMP were not preempted by federal law and the MMP was not invalid under the California Constitution, and entered judgment accordingly. Counties appeal.

III

THE STANDING ISSUE

State argues on appeal that Counties do not have standing to assert the CUA and MMP are unconstitutional.[5] State's argument presents two distinct issues. The first issue is whether a political subdivision of California, charged with the ministerial obligation to enforce or carry out state laws, may ever challenge a state enactment as unconstitutional. Must the entity comply with a state law until a court has declared the law unconstitutional, or may it instead bring a declaratory relief action challenging the constitutionality of that law? The second issue, which assumes a local governmental entity *may* challenge a state law as unconstitutional, is the extent of its standing. Does the entity have standing to challenge an entire statutory scheme--including those aspects of the scheme that impose no obligations on the entity--or

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[5] The issue of standing, raised at trial, is a jurisdictional issue that may be raised at any time notwithstanding the absence of a cross-appeal. (*Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1472 [285 Cal. Rptr. 456].)

is it limited to challenging only those aspects that impose specific obligations on or inflict particularized injury to the local governmental entity?

A. *General Principles*

A declaratory relief action requires an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) Courts will decline to resolve lawsuits that do not present a justiciable controversy, and justiciability "involves the intertwined criteria of ripeness and standing." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22 [61 Cal. Rptr. 618].)

"As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication *because he or she has either suffered or is about to suffer an injury of sufficient magnitude* reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large*.' [Quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 [166 Cal. Rptr. 844, 614 P.2d 276].] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical." (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315 [109 Cal. Rptr. 2d 154], italics added.)

When a party asserts a statute is unconstitutional, standing is not established merely because the party has been impacted by the statutory scheme to which the assertedly unconstitutional statute belongs. Instead, the courts have stated that "[a]t a minimum, standing means a party must '"show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"... .' [Quoting *Valley Forge College v. Americans United* (1982) 454 U.S. 464, 472 [70 L. Ed. 2d 700, 102 S. Ct. 752].] ... '"[I]t is well-settled law that the courts will not give their consideration to questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a *real and vital controversy between the litigants in the particular case before it*. It is incumbent upon a party to an action or proceeding who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby." [Citations.]' [Quoting *Worsley v. Municipal Court* (1981) 122 Cal.App.3d 409, 418 [176 Cal. Rptr. 324].]" (*In re Tania S.* (1992) 5 Cal.App.4th 728, 736-737 [7 Cal. Rptr. 2d 60].)

This court's analysis in *Tania S.* demonstrates that a party does not have standing to raise hypothetical constitutional infirmities of a statute when the statute, as applied to the party, does not occasion any injury to the party. In *Tania S.*, the appellant's children were declared dependents and removed from his custody when the court found, under Welfare and Institutions Code section 300, subdivision (b), that appellant's inability or failure to protect the children created a substantial risk of serious physical harm to them. (*In re Tania S., supra*, 5 Cal.App.4th at pp. 732-733.) The

appellant did not challenge the constitutionality of the portion of section 300, subdivision (b), under which the juvenile court made its jurisdictional findings, but instead asserted a second aspect of section 300, subdivision (b) (which cautioned that an allegation of willful failure to provide adequate medical treatment based on religious beliefs required a court to give some deference to the parent's religious practices) improperly created two classes of parents--those who injure their children out of a religious belief and those who injure their children for nonreligious reasons--making the entirety of section 300, subdivision (b), unconstitutional. (*In re Tania S.*, at pp. 735-736.) This court rejected the appellant's standing to raise the claim because the proceedings were not based on an allegation he did not provide the children adequate medical treatment or provided spiritual treatment through prayer. This court concluded that because the appellant "has not demonstrated he suffered any direct injury resulting from the assertedly unconstitutional portion of [the statute]," "we do not determine the substantive merits of [appellant's] claim the challenged portion of [the statute] is unconstitutional. Such determination will be made only if the claim is raised by one with standing." (*In re Tania S.*, at pp. 736-737, fn. omitted.)

B. *Limitations on Governmental Entities*

Plaintiffs here are local governmental entities that sought in the proceedings below, and seek in this appeal, a determination that they are not obligated to comply with their duties under the statutory scheme because the statutory scheme is unconstitutional. We must evaluate the extent to which a local governmental entity of the state may attack the

constitutionality of the laws it is obligated to administer.

As a general rule, a local governmental entity "charged with the ministerial duty of enforcing a statute ... generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the [entity's] view that it is unconstitutional." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082 [17 Cal. Rptr. 3d 225, 95 P.3d 459], fn. omitted.) In *Lockyer*, the court rejected the entity's argument that because the entity believed certain statutes (limiting marriage to a union between a man and a woman) were unconstitutional, it could bring the issue into court by defying state law and issuing licenses to same-sex couples. *Lockyer* noted that, although there may be limited circumstances in which a public entity might refuse to enforce a statute as a means of bringing the constitutionality of the statute before a court for judicial resolution, the exception does not apply when there exists "a clear and readily available means, other than the officials' wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a court." (*Id.* at p. 1099.) *Lockyer* noted that if the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, "they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure--a lawsuit brought by a couple who has been denied a license under existing--is the procedure that was utilized to

challenge the constitutionality of California's antimiscegenation statute ... . The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here." (*Lockyer*, at pp. 1098-1099, fn. and citation omitted.)

However, under some limited circumstances, a public entity threatened with injury by the allegedly unconstitutional operation of an enactment may have standing to raise the challenge in the courts. For example, in *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442 [29 Cal. Rptr. 2d 103], one enactment (Sen. Bill No. 1135 (1993-1994 Reg. Sess.)) reallocated property tax revenues away from the county and to school and community college districts, while a second enactment (Sen. Bill No. 399 (1993-1994 Reg. Sess.)) affected the formulas for determining the amount of moneys to be applied by the state for the support of school and community college districts. (23 Cal.App.4th at pp. 1447-1448.) The court concluded the county could challenge Senate Bill No. 1135's reallocation of funds away from the county. However, the court concluded the county did not have standing to challenge Senate Bill No. 399, stating:

> "Without mentioning [Senate Bill No.] 399, the County alleged in its complaint that the state will use the funds reallocated pursuant to [Senate Bill No.] 1135 to fulfill its responsibilities for the financial support of schools as mandated by Proposition 98. On appeal, the County contends the 'State's action' was invalid because 'it mandated a major shift in the use of local property taxes for a specific

State purpose, to fulfill the State's obligation under Proposition 98 to provide a constitutionally prescribed minimum amount of public education funding 'from state revenues.'" ' Thus, the County seeks to challenge both [Senate Bill No.] 1135 ... and [Senate Bill No.] 399 ... . [¶] The constitutionality of [Senate Bill No. 399] is not before us on this appeal. This appeal deals only with the reallocation of property tax revenues from local governments and special districts to school and community college districts. The County's concern is with the loss of property tax revenue to it because of the [Senate Bill No.] 1135 reallocation. How the state treats the reallocation in connection with the mandate of California Constitution, article XVI, section 8 (Proposition 98), is of possible concern to the educational entities which are beneficiaries of the constitutional mandate, but not the County. In short, there is simply no theory based on Proposition 98 and/or the effect of [Senate Bill No.] 399 upon it, which would, even assuming there were no other obstacles, entitle the County to a writ of mandate compelling compliance with County Ordinance No. 1993-0045, and negating [Senate Bill No.] 1135. The County lacks standing to raise the issue." (23 Cal.App.4th at p. 1449.)

The other courts that have granted standing to local public entities to raise constitutional challenges to enactments they were otherwise bound to enforce have similarly done so in the limited context of enactments that imposed duties directly on or denied significant rights to the entity itself. (See, e.g., *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42

Cal.3d 1, 5-10 [227 Cal. Rptr. 391, 719 P.2d 987] [state law provided exemption from local taxation for business inventories of foreign origin; county had standing to assert exemption violated commerce clause "because ... the agencies experienced significant revenue loss"]; *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355 [68 Cal. Rptr. 3d 656] [entity asserted materials it seized from medical marijuana user could not be returned because federal preemption principles barred return of marijuana; standing to raise issue recognized because entity had specific duty at issue under the statutory scheme and issue was limited to whether that duty violated preemption principles].) However, the courts have declined to confer standing on the entity to raise constitutional challenges to enactments that had no direct impact on the entity but instead affected only the entity's constituency. (See, e.g., *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59-63 [24 Cal. Rptr. 3d 72] [standing denied where enactment imposed no obligations on entity and only imposed restrictions on officials of entity].)

C. *Analysis*

State, relying on *Lockyer v. City and County of San Francisco, supra*, 33 Cal.4th 1055 and *In re Tania S., supra*, 5 Cal.App.4th 728, argues that because Counties have suffered no cognizable injury from the exemptions for medical marijuana users provided by the MMP or CUA, the action should be dismissed because Counties' "mere dissatisfaction with ... or disagreement with [state] policies does not constitute a justiciable controversy" and does not confer standing on Counties to raise constitutional complaints about the MMP or CUA. (*Zetterberg v. State Dept. of Public*

Health (1974) 43 Cal.App.3d 657, 662 [118 Cal. Rptr. 100].) Counties, relying on *Star-Kist Foods, Inc. v. County of Los Angeles, supra*, 42 Cal.3d 1 and *City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th 355, assert they have standing because they will suffer harm--by being required to establish and operate the apparatus to process and issue identification cards--from statutory obligations they argue are preempted by the CSA.[6]

The standing principles distilled from the cases convince us Counties do not have standing to challenge those portions of the MMP and CUA that are not applicable to them and that do not injuriously affect them. (*In re Tania S., supra*, 5 Cal.App.4th at 737.) Accordingly, because major portions of the MMP and CUA neither impose obligations on nor inflict direct injury to Counties, we reject Counties' effort to obtain an advisory opinion declaring the *entirety* of the MMP and the bulk of the CUA are invalid under preemption principles.[7] However, because limited portions of the

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[6] Counties, citing *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432 [261 Cal. Rptr. 574, 777 P.2d 610] *and Harman* v. City and County of San Francisco (1972) 7 Cal.3d 150 [101 Cal. Rptr. 880, 496 P.2d 1248], appear also to assert that standing exists when the party has a sufficient interest in the litigation to ensure the matter will be prosecuted with vigor. However, these cases did not hold a person willing to litigate a claim intensely acquires standing that is otherwise absent, and we are not aware of any case law suggesting that a willingness to fervently pursue a cause is the sine qua non of standing to litigate that cause.

[7] Our decision to limit Counties' constitutional challenge to those portions of the CUA and MMP that directly affect them is consonant with "[w]ell-settled principles of judicial restraint [that establish] when a case must be decided upon constitutional

MMP--i.e., those statutes requiring counties to adopt and operate the identification card system--*do* impose obligations on Counties, which obligations would be obviated were those statutes preempted by federal law, we conclude Counties have standing to raise preemption claims insofar as the MMP establishes the identification card system. Accordingly, we reach Counties' preemption arguments as to those statutes, and *only* those statutes, that require Counties to implement and administer the identification card system.[8]

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grounds, a court should strive to resolve the matter as narrowly as possible, and should avoid expansive constitutional pronouncements that inevitably prejudge future controversies and may have unforeseen and questionable consequences in other contexts. [Citations.]" (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 116 [40 Cal. Rptr. 2d 839, 893 P.2d 1160] (conc. opn. of George, J.).) This principle of jurisprudential restraint cautions against deciding broad constitutional questions raised, as here, by persons not injuriously affected by the challenged statute. (See generally *Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 802 [59 Cal. Rptr. 2d 463].)

[8] Specifically, we examine Counties' preemption claims only as to sections 11362.71, subdivision (b) (requiring counties to administer the identification card system established by the Department of Health Services), 11362.72 (specifying counties' obligations upon receipt of application for identification card), 11362.735 (specifying contents of identification card issued by counties), 11362.74 (specifying grounds and procedures for denying application), 11362.745 (specifying renewal procedures for cards), and 11362.755 (permitting counties to establish fees to defray cost of administering system), which impose obligations on Counties. We conclude Counties do not have standing to challenge (and therefore we do not evaluate) whether the remaining sections, and in particular sections 11362.5, subdivision (d), and 11362.765 (providing specified persons with exemptions from state law penalties for specified offenses), are preempted by the CSA.

IV

THE PREEMPTION ISSUE

A. *General Principles*

Principles of preemption have been articulated by numerous courts. "'The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is "'without effect.'" [Citations.] It is equally well established that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.'" [Citation.] Thus, '"'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis." [Citation.]'" (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949 [28 Cal. Rptr. 3d 685, 111 P.3d 954].)

The California Supreme court has identified "four species of federal preemption: express, conflict, obstacle, and field. [Citation.] [¶] First, express preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when '"under the circumstances of [a] particular case, [the challenged state law] stands as

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Citations.] Finally, field preemption, i.e., 'Congress' intent to preempt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citation.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935-936 [63 Cal. Rptr. 3d 50, 162 P.3d 569], fn. omitted (*Viva!*).)

The parties agree, and numerous courts have concluded, Congress's statement in the CSA that "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter" (21 U.S.C. § 903) demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances. (See, e.g., *People v. Boultinghouse* (2005) 134 Cal.App.4th 619, 623 [36 Cal. Rptr. 3d 244] [21 U.S.C. § 903's '"express statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force"']; *Gonzales v. Oregon* (2006) 546 U.S. 243, 289 [163 L. Ed. 2d 748, 126 S. Ct. 904] (dis. opn. of Scalia, J.) [characterizing § 903 as a "nonpre-emption clause"]; *City of Hartford v. Tucker* (1993) 225 Conn. 211 [621 A.2d 1339, 1341] [describing 21 U.S.C. § 903 and "the antipreemption provision of the Controlled Substances Act"].) When Congress has expressly described the scope of the state laws it intended to preempt, the courts "infer Congress intended to preempt no more

than that absent sound contrary evidence." *(Viva!, supra*, 41 Cal.4th at p. 945.)

B. *Conflict and Obstacle Preemption*

Although the parties agree that neither express nor field preemption apply in this case, they dispute whether title 21 United States Code section 903 signified a congressional intent to displace only those state laws that positively conflict with the provisions of the CSA, or also signified a congressional intent to preempt any laws posing an obstacle to the fulfillment of purposes underlying the CSA.

Conflict Preemption

Conflict preemption will be found when "simultaneous compliance with both state and federal directives is impossible." (*Viva!, supra*, 41 Cal.4th at p. 936.) *In Southern Blasting Services v. Wilkes County*, NC (4th Cir. 2002) 288 F.3d 584, the court construed the effect of a federal preemption clause substantively identical to title 21 United States Code section 903.[9] In rejecting the plaintiffs' argument that the local ordinances were invalid because they were in "direct and positive conflict" with the federal law, the *Southern Blasting* court concluded that "[t]he 'direct

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[9] The preemption clause evaluated by the *Southern Blasting* court provided that, "No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." (18 U.S.C. § 848.)

and positive conflict' language in 18 U.S.C. § 848 simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that 'compliance with both federal and state regulations is a physical impossibility.' [Quoting *Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713 [85 L. Ed. 2d 714, 105 S. Ct. 2371].] Indeed, § 848 explains that in order for a direct and positive conflict to exist, the state and federal laws must be such that they 'cannot be reconciled or consistently stand together.' " (*Southern Blasting, supra*, at p. 591; accord, *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-143 [10 L. Ed. 2d 248, 83 S. Ct. 1210] [state law preempted where "compliance with both federal and state regulations is a physical impossibility"].)

Congress has the power to permit state laws that, although posing some obstacle to congressional goals, may be adhered to without requiring a person affirmatively to violate federal laws. (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 872 [146 L. Ed. 2d 914, 120 S. Ct. 1913] [dicta].) In *Gonzales v. Oregon, supra*, 546 U.S. 243, the court considered whether the CSA, by regulating controlled substances and making some substances available only pursuant to a prescription by a physician "issued for a legitimate medical purpose" (21 C.F.R. § 1306.04(a) (2008)), permitted the federal government to effectively bar Oregon's doctors from prescribing drugs pursuant to Oregon's assisted suicide law by issuing a federal administrative rule (the Directive) that use of controlled substances to assist suicide is not a legitimate medical practice and dispensing or prescribing them for this purpose is unlawful under the CSA. The majority concluded the CSA's

preemption clause showed Congress "explicitly contemplates a role for the States in regulating controlled substances" (*Gonzales v. Oregon*, at p. 251), including permitting the states latitude to continue their historic role of regulating medical practices. In dissent, Justice Scalia concluded title 21 United States Code section 903 was "embarrassingly inapplicable" to the majority's preemption analysis because the preemptive impact of section 903 reached only state laws that affirmatively mandated conduct violating federal laws. (*Gonzales v. Oregon, supra*, 546 U.S. at p. 289 (dis. opn. of Scalia, J.).)[10] Thus, it appears Justice Scalia's interpretation suggests a state law is preempted by a federal "positive conflict" clause, like 21 U.S.C. section 903, only when the state law affirmatively requires acts violating the federal proscription.

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[10] Justice Scalia explained that title 21 United States Code section 903 only "affirmatively *prescrib*[*ed*] federal pre-emption whenever state law creates a conflict. In any event, the Directive does not purport to pre-empt state law in any way, not even by conflict pre-emption unless the Court is under the misimpression that some States *require* assisted suicide. The Directive merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law (or at least the law of the State of Oregon)." (*Gonzales v. Oregon, supra*, 546 U.S. at pp. 289-290 (dis. opn. of Scalia, J.).)

Obstacle Preemption

Obstacle preemption[11] will invalidate a state law when "'"under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Citations.]" (*Viva!, supra*, 41 Cal.4th at p. 936.) Under obstacle preemption, whether a state law presents "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: [¶] 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished--if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect--the state law must yield to the regulation of Congress within the sphere of its delegated power.'" (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 373 [147 L. Ed. 2d 352, 120 S. Ct. 2288].)

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[11] The parties dispute whether obstacle preemption is merely an alternative iteration of conflict preemption, or whether obstacle preemption requires an analytical approach distinct from conflict preemption. Our Supreme Court, although recognizing that the courts have often "group[ed] conflict preemption and obstacle preemption together in a single category" (*Viva!, supra*, at pp. 935-936, fn. 3), has concluded the two types of preemption are "analytically distinct and may rest on wholly different sources of constitutional authority [and] we treat them as separate categories . . ." (*Ibid.*)

C. *The State Identification Card Laws and Preemption*

The parties below disputed the effect of the language of title 21 United States Code section 903, which provides:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict* between that provision of this subchapter and that State law *so that the two cannot consistently stand together*." (Italics added.)

In the proceedings below, State and other respondents contended this language evidenced a congressional intent to preempt only those state laws in direct and positive conflict with the CSA so that compliance with both the CSA and the state laws is impossible. Counties asserted this language was merely intended to eschew express and field preemption and should be construed as declaring Congress's intent to preempt any state laws that posed a substantial obstacle to the fulfillment of purposes underlying the CSA in addition to those in direct conflict. The trial court, after concluding title 21 United States Code section 903 was intended to preserve all state laws except insofar as compliance with both the CSA and the state statute was impossible, found the MMP and CUA were not preempted because they did not mandate conduct violating the CSA.

21 U.S.C. Section 903 Limits Preemption to Positive Conflicts

The intent of Congress when it enacted the CSA is the touchstone of our preemption analysis. (*Jevne v. Superior Court, supra*, 35 Cal.4th at p. 949.) When Congress legislates in a "field which the States have traditionally occupied[,] ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [91 L. Ed. 1447, 67 S. Ct. 1146].) Because the MMP and CUA address fields historically occupied by the states--medical practices (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [135 L. Ed. 2d 700, 116 S. Ct. 2240]) and state criminal sanctions for drug possession (*City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at pp. 383-386)--the presumption against preemption informs our resolution of the scope to which Congress intended the CSA to supplant state laws, and cautions us to narrowly interpret the scope of Congress's intended invalidation of state law. (*Medtronic, supra*, 518 U.S. 470.)

Our evaluation of the scope of Congress's intended preemption examines the text of the federal law as the best indicator of Congress's intent and, where that law "contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62-63 [154 L. Ed. 2d 466, 123 S. Ct. 518].) Because "[i]n these cases, our task is to identify the domain

expressly pre-empted [citation] ... ' express definition of the pre-emptive reach of a statute ... supports a reasonable inference ... that Congress did not intend to pre-empt other matters ...' [citation]." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 [150 L. Ed. 2d 532, 121 S. Ct. 2404]; accord, *Viva!, supra*, 41 Cal.4th at pp. 944-945 [inference that express definition of preemptive reach means Congress did not intend to preempt other matters "is a simple corollary of ordinary statutory interpretation principles and in particular 'a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.'"].)

The language of title 21 United States Code section 903 expressly limits preemption to only those state laws in which there "is a *positive conflict* between [the federal and state law] *so that the two cannot consistently stand together*." (Italics added.) When construing a statute, the courts seek to attribute significance to every word and phrase (*United States v. Menasche* (1955) 348 U.S. 528, 538-539 [99 L. Ed. 615, 75 S. Ct. 513]) in accordance with their usual and ordinary meaning. (*Strong v. State Bd. of Equalization* (2007) 155 Cal.App.4th 1182, 1193 [66 Cal. Rptr. 3d 657].) The phrase "positive conflict," particularly as refined by the phrase that "the two [laws] cannot consistently stand together," suggests that Congress did not intend to supplant all laws posing some conceivable obstacle to the purposes of the CSA, but instead intended to supplant only state laws that could not be adhered to without violating the CSA. Addressing analogous express preemption clauses, the court in *Southern Blasting Services v. Wilkes County*,

NC, supra, 288 F.3d 584 held the state statute was not preempted because compliance with both the state and federal laws was not impossible, and the court in *Levine v. Wyeth* (Vt. 2006) 944 A.2d 179, 190-191 construed a federal statute with an analogous express preemption clause (which preserved state laws unless there is a direct and positive conflict) as "essentially remov[ing] from our consideration the question of whether [state law] claims [are preempted as] an obstacle to the purposes and objectives of Congress." Because title 21 United States Code section 903 preserves state laws except where there exists such a *positive* conflict that the two laws *cannot* consistently stand together, the *implied* conflict analysis of obstacle preemption appears beyond the intended scope of title 21 United States Code section 903.

Counties argue this construction is too narrow, and we should construe Congress's use of the term "conflict" in 21 United States Code section 903 as signifying an intent to incorporate both positive and implied conflict principles into the scope of state laws preempted by the CSA. Certainly, the United States Supreme Court has concluded that federal legislation containing an express preemption clause and a savings clause does not necessarily preclude application of implied preemption principles. (See *Geier v. American Honda Motor Co., supra*, 529 U.S. 861; *Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341 [148 L. Ed. 2d 854, 121 S. Ct. 1012]; *Sprietsma v. Mercury Marine, supra*, 537 U.S. 51.) However, none of Counties' cited cases examined preemption clauses containing the "positive conflict" language included in title 21 United States Code section 903, and thus

provide little guidance here.[12] Indeed, Counties' proffered construction effectively reads the term "positive" out of section 903, which transgresses the interpretative canon that we should accord meaning to every term and phrase employed by Congress. (*United States v. Menasche, supra*, 348 U.S. at 538-539.) Moreover, when Congress has intended to craft an express preemption clause signifying that *both* positive and obstacle conflict preemption will invalidate state laws, Congress has so structured the express preemption clause. (See 21 U.S.C. § 350e(e)(1) [Congress declared that state requirements would be "preempted if--[¶] (A) complying with [the federal and state statutes] is not possible; or [¶] (B) the requirement of the State ... as applied or enforced is an obstacle to accomplishing and carrying out [the federal

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[12] In *Geier* and *Sprietsma*, the express preemption clauses precluded a state from establishing any safety standard regarding a vehicle (*Geier*) or vessel (*Sprietsma*) not identical to the federal standard, but separate "savings" clauses specified that compliance with the federal safety standards did not exempt any person from any liability under common law. (*Geier v. American Honda Motor Co., supra*, 529 U.S. at pp. 867-868; *Sprietsma v. Mercury Marine, supra*, 537 U.S. at pp. 58-59.) The analysis of the interplay between two statutes, as addressed by the *Geier* and *Sprietsma* courts, bears no resemblance to the issues presented here. In *Buckman Co. v. Plaintiffs' Legal Comm., supra*, 531 U.S. 341, the issues examined by the court are even more remote from the issues we must resolve. First, the *Buckman* court specifically recognized that the preemption issue there involved "[p]olicing fraud against federal agencies[, which] is hardly 'a field which the States have traditionally occupied,' [citation] such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." (*Buckman*, at p. 347.) Moreover, *Buckman* effectively relied on field preemption concerns to delimit state fraud claims. (*Id.* at pp. 348 353.) Neither of these aspects of *Buckman* is relevant to the issues we must resolve.

statute]"].) Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, "'the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.'" (*In re Jennings* (2004) 34 Cal.4th 254, 273 [17 Cal. Rptr. 3d 645, 95 P.3d 906].)

Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible.

The Identification Laws Do Not Positively Conflict With the CSA

Counties do not identify any provision of the CSA necessarily violated when a county complies with its obligations under the state identification laws.[13] The

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[13] San Bernardino concedes on appeal that compliance with California law "may not require a violation of the CSA," although it then asserts it "encourages if not facilitates the CSA's violation." However, the *Garden Grove* court has already concluded, and we agree, that governmental entities do not incur aider and abettor liability by complying with their obligations under the MMP (*City of Garden Grove v. Superior Court, supra*, 157 Cal.App.4th at 389-392), and we therefore reject San Bernardino's implicit argument that requiring a county to issue identification cards renders that

identification laws obligate a county only to process applications for, maintain records of, and issue cards to, those individuals entitled to claim the exemption. The CSA is entirely silent on the ability of states to provide identification cards to their citizenry, and an entity that issues identification cards does not engage in conduct banned by the CSA.

Counties appear to argue there is a positive conflict between the identification laws and the CSA because the card issued by a county confirms that its bearer may violate or is immunized from federal laws.[14] However, the applications for the card expressly state the card will not insulate the bearer from federal laws, and the card itself does not imply the holder is immune from prosecution for federal offenses; instead, the card merely identifies those persons California has elected to exempt from California's sanctions. (Cf. *U.S. v. Cannabis Cultivators Club* (N.D.Cal. 1998) 5 F.Supp.2d 1086, 1100 [California's CUA "does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws"].)

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county an aider and abettor to create a positive conflict with the CSA.

[14] San Diego also cites numerous subdivisions of the CUA and MMP, which contain a variety of provisions allegedly authorizing or permitting persons to engage in conduct expressly barred by the CSA, to show the CUA and MMP in positive conflict with the CSA. However, none of the cited subdivisions are contained in the statutes that Counties have standing to challenge (see fn. 8, *ante*), and we do not further consider Counties' challenges as to those provisions.

Because the CSA law does not compel the states to impose criminal penalties for marijuana possession, the requirement that counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA.

Accordingly, we reject Counties' claim that positive conflict preemption invalidates the identification laws because Counties' compliance with those laws can "consistently stand together" with adherence to the provisions of the CSA.

D. *The Identification Card Laws and Obstacle Preemption*

Although we conclude title 21 United States Code section 903 signifies Congress's intent to maintain the power of states to elect "to 'serve as a laboratory' in the trial of 'novel social and economic experiments without risk to the rest of the country'" (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 502 [149 L. Ed. 2d 722, 121 S. Ct. 1711] (conc. opn. of Stevens, J.)) by preserving all state laws that do not positively conflict with the CSA, we also conclude the identification laws are not preempted even if Congress had intended to preempt laws posing an obstacle to the CSA. Although state laws may be preempted under obstacle preemption when the law ""stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"" (*Viva!, supra*, 41 Cal.4th at p. 936), not every state law posing some de minimus impediment will be preempted. To the contrary, "[d]isplacement will occur only where, as we have variously described, a '*significant conflict*' exists between an identifiable

'federal policy or interest and the [operation] of state law,' [citation] or the application of state law would 'frustrate specific objectives' ... [citation]." (*Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507 [101 L. Ed. 2d 442, 108 S. Ct. 2510], italics added.) Indeed, *Boyle* implicitly recognized that when Congress has legislated in a field that the states have traditionally occupied, rather than in an area of unique federal concern, obstacle preemption requires an even sharper conflict with federal policy before the state statute will be invalidated. (*Ibid.*)

We conclude the identification card laws do not pose a significant impediment to specific federal objectives embodied in the CSA. The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices. (*Gonzales v. Oregon, supra*, 546 U.S. at pp. 270-272 [holding Oregon's assisted suicide law fell outside the preemptive reach of the CSA].) The identification card laws merely provide a mechanism allowing qualified California citizens, if they so elect, to obtain a form of identification that informs state law enforcement officers and others that they are medically exempted from the state's criminal sanctions for marijuana possession and use. Although California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals of or is inconsistent with the CSA--a question we do not decide here--any alleged "obstacle" to the federal goals is presented by those California statutes that *create the exemptions*, not by the statutes providing a system for rapidly identifying exempt individuals. The identification card statutes impose no significant *added* obstacle to the purposes of the CSA not otherwise inherent in the provisions of the exemptions that Counties do not have

standing to challenge, and we therefore conclude the limited provisions of the MMP that Counties *may* challenge are not preempted by principles of obstacle preemption.

We are unpersuaded by Counties' arguments that the identifications laws, standing alone, present significant obstacles to the purposes of the CSA.[15] For example, Counties assert that identification cards make it "easier for individuals to use, possess, and cultivate marijuana" in violation of federal laws, without articulating why the absence of such a card--which is entirely voluntary and not a prerequisite to the exemptions available for such underlying conduct--renders the underlying conduct significantly more difficult.

Counties also appear to assert the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed to the extent the identification card precludes California's law enforcement officers from

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[15] The bulk of Counties' arguments on obstacle preemption focus on statutory provisions other than the identification card statutes. Because Counties do not have standing to challenge those statutes, we decline Counties' implicit invitation to issue an advisory opinion on whether those statutes are preempted by the CSA, and instead examine only those aspects of the statutory scheme imposing obligations on Counties.

arresting medical marijuana users. The argument falters on its own predicate because Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws. In *Printz v. United States* (1997) 521 U.S. 898 [138 L. Ed. 2d 914, 117 S. Ct. 2365], the federal Brady Act purported to compel local law enforcement officials to conduct background checks on prospective handgun purchasers. The United States Supreme Court held the 10th Amendment to the United States Constitution deprived Congress of the authority to enact that legislation, concluding that "in [*New York v. United States* (1992) 505 U.S. 144 [120 L. Ed. 2d 120, 112 S. Ct. 2408] we ruled] that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." (*Printz*, at p. 935.)[16] Accordingly, we conclude the fact that

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[16] San Diego argues the anticommandeering doctrine discussed in *Printz* is inapplicable because the court in *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 289-290 [69 L. Ed. 2d 1, 101 S. Ct. 2352] explicitly rejected the assertion the Tenth Amendment delimited Congress's ability under the commerce clause to displace state laws. However, *Printz* rejected an analogous claim when it held that, although the commerce clause authorized Congress to *enact* legislation concerning handgun registration, the Brady Act's *direction of the actions of state executive officials* was not constitutionally valid under United States Constitution, article I, section 8, as a law "necessary and proper" to the execution of Congress's commerce clause power to regulate handgun sales, because when "a 'La[w]

California has decided to exempt the bearer of an identification card from arrest by state law enforcement for state law violations does not invalidate the identification laws under obstacle preemption. (Cf. *Conant v. Walters, supra*, 309 F.3d at p. 646 (conc. opn. of Kozinski, J.) ["That patients may be more likely to violate federal law if the additional deterrent of state liability is removed may worry the federal government, but the proper response--according to *New York* and *Printz*--is to ratchet up the federal regulatory regime, *not* to commandeer that of the state."].)

We conclude that even if Congress intended to preempt state laws that present a significant obstacle to the CSA, the MMP identification card laws are not preempted.

V

THE AMENDMENT ISSUE

The CUA was adopted by initiative when the voters adopted Proposition 215. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 767 [33 Cal. Rptr. 3d 859].) Article II, section 10, subdivision (c) of the California Constitution provides the Legislature may "amend or

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... for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier [citation] it is not a 'La[w] ... *proper* for carrying into Execution the Commerce Clause.'" (*Printz, supra*, 521 U.S. at pp. 923-924.) Thus, although the commerce clause permits Congress to *enact* the CSA, it does not permit Congress to *conscript state officers* into arresting persons for violating the CSA.

repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." San Bernardino asserts on appeal that the identification laws, which are among the statutes adopted by the Legislature without voter approval when it enacted the MMP, are invalid because they amend the CUA.

This issue, although not pleaded in the complaints filed by either San Bernardino or San Diego, was initially raised by County of Merced's (Merced) complaint in intervention. State argues on appeal that because Merced has not appealed, and only Merced formally pleaded the article II, section 10, subdivision (c), issue, we may not on appeal consider San Bernardino's arguments as to this issue. During oral arguments on the motions for judgment on the pleadings, San Bernardino adopted and joined in Merced's arguments, without objection by State that the arguments were beyond the scope of San Bernardino's pleadings. Additionally, the trial court's judgment, after noting that one of the issues raised by Merced and joined in by San Bernardino was the article II, section 10, subdivision (c), issue, specifically noted in its judgment that "[a]t oral argument, each party agreed that all plaintiffs win or lose together," and thereafter ruled on the article II, section 10, subdivision (c), issue. Under these circumstances, we conclude that because (1) the parties litigated the matter below on the understanding that San Diego and San Bernardino were properly asserting the additional ground of invalidity raised by Merced, and (2) the trial court's judgment against San Bernardino included a rejection of all of the arguments raised by all co-plaintiffs, San Bernardino may litigate this issue

on appeal. (See, e.g., *Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876-877 [67 Cal. Rptr. 2d 411].)

Although legislative acts are entitled to a strong presumption of constitutionality, the Legislature cannot amend an initiative, including the CUA, unless the initiative grants the Legislature authority to do so. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251-1253 [48 Cal. Rptr. 2d 12, 906 P.2d 1112].) Because the CUA did not grant the Legislature the authority to amend it without voter approval, and the identification laws were enacted without voter approval, those laws are invalid if they *amend* the CUA within the meaning of article II, section 10, subdivision (c) of the California Constitution.

The proscription embodied in article II, section 10, subdivision (c) of the California Constitution is designed to "'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484 [76 Cal. Rptr. 2d 342].) "[L]egislative enactments related to the subject of an initiative statute may be allowed" when they involve a "related but distinct area" (*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43 [41 Cal. Rptr. 2d 393]) or relate to a subject of the initiative that the initiative "does not specifically authorize *or* prohibit." (*People v. Cooper* (2002) 27 Cal.4th 38, 47 [115 Cal. Rptr. 2d 219, 37 P.3d 403].)

The identification laws do not improperly amend the provisions of the CUA.[17] The MMP's identification card system, by specifying participation in that system is voluntary and a person may "claim the protections of [the CUA]" without possessing a card (§ 11362.71, subd. (f)), demonstrates the MMP's identification card system is a discrete set of laws designed to confer distinct protections under California law that the CUA does *not* provide without limiting the protections the CUA *does* provide. For example, unlike the CUA (which did not immunize medical marijuana users from arrest but instead provided a limited "immunity" defense to prosecution under state law for cultivation or possession of marijuana, see *People v. Mower* (2002) 28 Cal.4th 457, 468-469 [122 Cal. Rptr. 2d 326, 49 P.3d 1067]), the MMP's identification card system is designed to protect against unnecessary arrest. (See § 11362.78 [law enforcement officer must accept the identification card absent reasonable cause to believe card was obtained or is being used fraudulently].) Additionally, the MMP exempts the bearer of an

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[17] We recognize the Second District Court of Appeal has concluded that one statute enacted as part of the MMP--section 11362.77, subdivision (a) (establishing a ceiling on the amount of marijuana a qualified patient or primary caregiver may possess)--was an improper amendment of the CUA. (See *People v. Kelly* (2008) 163 Cal.App.4th 124 [77 Cal. Rptr. 3d 390].) Although it is unclear either that the *Kelly* court was required to reach the issue or that its resolution of the issue was correct, *Kelly* did not purport to hold the entire MMP invalid but instead severed the quantity limitations of section 11362.77, subdivision (a) from the balance of the MMP and determined only that the severed aspect of the MMP was an unconstitutional amendment of the CUA. Because we here address different aspects of the MMP from that considered in *Kelly*, the conclusion in *Kelly* is inapposite to our task.

identification card (as well as qualified patients as defined by the MMP) from liability for other controlled substance offenses not expressly made available to medical marijuana users under the CUA. (Compare § 11362.5, subd. (d) [§§ 11357 and 11358 do not apply to patient or primary caregiver if substance possessed or cultivated for personal medical purposes] with § 11362.765, subd. (a) [specified persons not subject to criminal liability for §§ 11359, 11360, 11366.5 or 11570 in addition to providing exemptions from §§ 11357 and 11358, which parallel the CUA's exemption].)

Counties, relying on *Franchise Tax Board v. Cory* (1978) 80 Cal.App.3d 772 [145 Cal. Rptr. 819],[18] asserts that any legislation that adds provisions to an initiative statute, for purposes of either correcting it or clarifying it, is amendatory within the proscriptions of article II, section 10, subdivision (c).[19] However, in

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[18] San Bernardino appears to rely on *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187 [219 Cal. Rptr. 664] for the proposition that legislative action constitutes an amendment of a prior initiative statute in violation of article II, section 10, subdivision (c), of the California Constitution if its purpose is to clarify or correct uncertainties in existing law. However, the *Planned Parenthood Affiliates* court evaluated whether the legislation under consideration violated the single subject rule of article IV, section 9 of the California Constitution, and had no occasion to consider whether the statute was invalid under article II, section 10, subdivision (c).

[19] San Bernardino also quotes, without citation to the record, certain statements of legislative intent allegedly declaring the intent of the MMP was to "clarify the scope" of the CUA and "address issues that were not included in the [CUA]." Even were we to consider this argument (but see *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826-827, fn. 1 [19 Cal. Rptr. 3d 84] [failure of party to cite record permits appellate

Franchise Tax Board, the court invalidated the legislative enactment because the initiative statute required audits of financial reports of candidates for public office, and the legislative enactment both added to the audit requirements of the initiative statute (by specifying the standards to be employed by the audit) and by "significantly restricting the manner in which audits are to be conducted." (*Franchise Tax Board v. Cory, supra*, 80 Cal.App.3d at p. 777.)

Here, although the legislation that enacted the MMP added statutes regarding California's treatment of those who use medical marijuana or who aid such users, it did not add statutes or standards *to the CUA*. Instead, the MMP's identification card is a part of a separate legislative scheme providing separate protections for persons engaged in the medical marijuana programs, and the MMP carefully declared that the protections provided by the CUA were preserved without the necessity of complying with the identification card provisions. (§ 11362.71, subd. (f).) The MMP, in effect, amended provisions of the Health and Safety Code regarding regulation of drugs adopted by the Legislature, not provisions of the CUA. Because

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court to disregard matter]), it ignores that other legislative history accompanying adoption of the MMP specified "[n]othing in [the MMP] shall amend or change Proposition 215, nor prevent patients from providing a defense under Proposition 215 .... *The limits set forth in [the MMP] only serve to provide immunity from arrest for patients taking part in the voluntary ID card program, they do not change Section 11362.5 (Proposition 215).*" (Sen. Rules Com., Off. of Sen. Floor Analyses, com. on Sen. Bill No. 420 (2003-2004 Reg. Sess.) as amended Sept. 9, 2003.) Thus, the legislative history suggests the MMP was *not* intended to alter or affect the rights provided by the CUA

the MMP's identification card program has no impact on the protections provided by the CUA, we reject Counties' claim that those provisions are invalidated by article II, section 10, subdivision (c), of the California Constitution.

DISPOSITION

The judgment is affirmed.

O'Rourke, J., and Irion, J., concurred.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Consolidated Case No. GIC 860665

[Filed January 17, 2007]

COUNTY OF SAN DIEGO,

Plaintiffs,

vs.

SAN DIEGO NORML, a California Corporation; STATE OF CALIFORNIA; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive,

Defendants.

COUNTY OF SAN BERNARDINO, and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,

Plaintiffs,

vs.

STATE OF CALIFORNIA, SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES 1 through 50, inclusive,

Defendants.

COUNTY OF MERCED and MARK PAZIN, as Sheriff of the County of Merced, and DOES 51 THROUGH 100, inclusive,

Intervenors.

WENDY CHRISTAKES ; PAMELA SAKUDA; NORBERT LITZINGER; WILLIAM BRITT: YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; AND AMERICANS FOR SAFE ACCESS,

Third-Party Plaintiff Intervenors.

[~~PROPOSED~~] JUDGMENT ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

DATE: November 16, 2006
TIME: 1:30 p.m.
DEPT: 64
JUDGE: The Honorable William R. Nevitt, Jr.

Plaintiffs' and Defendants' Cross-Motions for Judgment on the Pleadings came regularly for hearing on November 16, 2006, the Honorable William R. Nevitt, Jr. presiding. Plaintiff county of San Diego appeared through its counsel of record Thomas D. Bunton. Plaintiff County of San Bernardino, and Gary Penrod as Sheriff of the County of San Bernardino, appeared through their counsel of record Alan L. Green and Charles J. Larkin. Defendant San Diego NORML appeared through its counsel of record Jeremy D. Blank. Intervenors County of Merced and Mark Pazin, as Sheriff of the County of Merced, appeared through their counsel of record Walter W. Wall. Third-Party Plaintiff Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access appeared through their counsel of record Adam B. Wolf and Joe Elford. Defendants State of California and Sandra Shewry, in her official capacity as Director of California Department of Health Services, appeared through their counsel Leslie R. Lopez.

The Court, having read and considered all papers filed in consideration with the cross-motions for judgment on the pleadings, including all other relevant matters, and having heard and considered the arguments of counsel, took the matter under submission.

Thereafter, on December 6, 2006, the Court issued its decision entitled Order Re Motions For Judgment On The Pleadings, which is attached hereto as Exhibit "A," and incorporated in its entirety by this reference.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Judgment is entered in favor Defendants State of California and Sandra Shewry, in her official capacity as Director of California Department of Health Services, San Diego NORML, a California corporation, and Third-Party Plaintiff Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access.

2. Judgment is entered against Plaintiffs County of San Diego, County of San Bernardino and Gary Penrod, as Sheriff of the County of San Bernardino, and Intervenors County of Merced and Mark Pazin, as Sheriff of the County of Merced.

3. Defendants State of California and Sandra Shewry, in her official capacity as Director of California Department of Health Services, shall recover their costs pursuant to memoranda of costs, including any costs recoverable pursuant to Government Code section 6103.5 in the amount of $_____.

4. Third-Party Plaintiff Intervenors Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access shall recover their costs pursuant to memoranda of costs in the amount of $_____.

5. Defendant San Diego NORML, a California corporation, shall recover its costs pursuant ta memoranda of costs in the amount of $_____.

Dated: 1/17/07

/s/_____
The Honorable William R. Nevitt, Jr.
Judge of the San Diego County
Superior Court

EXHIBIT A

County of San Diego v. San Diego NORML, et al.
San Diego County Superior Court Consolidated
Case No. GIG'S60665

[PROPOSED] JUDGMENT ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Case No. GIC 860665

[Filed December 6, 2006]

COUNTY OF SAN DIEGO,

Plaintiff,

v.

SAN DIEGO NORML, a California Corporation; SANDRA SHEWRY, Director of the California Department of Health Services in her official capacity; and DOES 1 through 50, inclusive,

Defendants

COUNTY OF SAN BERNARDINO, and GARY PENROD as Sheriff of the COUNTY OF SAN BERNARDINO,

Plaintiffs,

v.

STATE OF CALIFORNIA, SANDRA SHEWRY, in her official capacity as Director of California Department of Health Services; and DOES 1 through 50, inclusive,

Defendant.

COUNTY OF MERCED and MARK PAZIN, as Sheriff of the COUNTY OF MERCED and DOES 51 THROUGH 100, inclusive,

Intervenors

WENDY CHRISTAKES ; PAMELA SAKUDA; NORBERT LITZINGER; WILLIAM BRITT: YVONNE WESTBROOK; STEPHEN O'BRIEN; WO/MEN'S ALLIANCE FOR MEDICAL MARIJUANA; AND AMERICANS FOR SAFE ACCESS,

Third-Party Plaintiff Intervenors.

ORDER RE MOTIONS FOR JUDGMENT ON THE PLEADINGS

Judge: Hon. William R. Nevitt, Jr.
Dept.: 64

The Court has considered the papers filed in support of and in opposition to the motion for judgment on the pleadings filed in this matter by each party. The Court heard oral argument on November 16, 2006. The matter has been submitted, and the Court now issues its rulings deciding those motions. These rulings dispose of the entire matter.

The rulings herein do not decide whether marijuana has medical benefits, or for whom. Those issues are not before this Court in this matter. This matter presents the Court with issues of law only.

A. The Nature and Procedural History of this Matter.

Case GIC860665 is the declaratory relief action filed on February 1, 2006, by County of San Diego against San Diego NORML, the State of California, and Sandra Shewry in her official capacity as Director of the California Department of Health Services.

Case GIC861051 is the declaratory relief action filed on February 8, 2006, by County of Bernardino and Gary Penrod, as Sheriff of the County of San Bernardino, against the State of California and Sandra Shewry.

On March 30, 2006, the above two cases were consolidated, with GIC860665 as the lead case.

On June 2, 2006, the Court granted the motion of County of Merced and Mark Pazin, as Sheriff of the County of Merced, for leave to file their Complaint In Intervention alleging causes of action for declaratory relief and injunctive relief.

On August 4, 2006, the Court granted the motion by Wendy Christakes, Pamela Sakuda, Norbert Litzinger, William Britt, Yvonne Westbrook, Stephen O'Brien, the Wo/Men's Alliance for Medical Marijuana and Americans for Safe Access (collectively, "Patient Intervenors") for leave to file their proposed complaint in intervention (on condition they simultaneously file an amendment to their proposed complaint in intervention that explicitly states that subdivision (d) of Health and Safety Code section 11362.5 is not being placed in issue by their complaint). That complaint in intervention and the amendment thereto were filed on August 10, 2006.

The three counties and two sheriffs allege that Health and Safety code[1] section 11362.5 ("Compassionate Use Act" or "CUA"), with the exception of subdivision (d) thereof, and sections 11362.7 through 11362.83 ("MMP"[2]) are preempted, by the Supremacy Clause of the United States Constitution, by the federal Controlled Substance Act

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[1] Unless otherwise noted, statutory references herein are to the California Health and Safety Code.

[2] The Medical Marijuana Program (Div. 10, Ch. 6, Art. 2.5) actually includes sections 11362.7 through 11362.9, but the plaintiffs' complaints challenge only 11362.7 through 11362.83, i.e., all but § 11362.9. The challenged sections will be referred to herein as the "MMP."

("CSA") and/or by the Single Convention on Narcotic Drugs ("Single Convention"). The CUA is the codification of Proposition 215, an initiative.

County of Merced and Sheriff Pazin also allege that the MMP (in purported contravention of section 10(c) of article II of the California Constitution) improperly "amends" the CUA. At oral argument on November 16, 2006, the other counties and sheriff joined in this challenge under section 10(c) of article II of the California Constitution.

The counties and sheriffs filed motions for judgment on the pleadings. The State of California (and Sandra Shewry) and Patient Intervenors also filed motions for judgment on the pleadings. San Diego NORML also filed a notice of motion for judgment on the pleadings, but merely "adopts, joins in, and incorporates by reference herein all arguments made by" the State and Patient Intervenors. San Diego NORML also "adopts, joins in, and incorporates by reference as though set forth fully herein all arguments" made in the State's and Patient Intervenors' oppositions to the counties' motions.

The three counties and two sheriffs are collectively referred to below as "plaintiffs." The State, Sandra Shewry, Patient Intervenors and San Diego NORML are collectively referred to below as "defendants."

At oral argument, each party agreed that all plaintiffs win or lose together and that all defendants win or lose together.

B. The Primary Legal Issues.

The three primary legal issues presented by this matter are as follows:

1. Whether plaintiffs have standing to file and pursue their complaints.

2. Whether the CUA, with the exception of subdivision (d) thereof, and the MMP are preempted by the Supremacy Clause of the United States Constitution, by the federal CSA, and/or by the Single Convention.

3. Whether the MMP, in alleged contravention of section 10(c) of article I1 of the California Constitution, improperly "amends" the CUA, an initiative statute.

Each of these three issues is addressed below.

1. Whether plaintiffs have standing to file and pursue their complaints.

The issue of plaintiffs' standing was first raised via demurrers, which the Court overruled. The Court finds the standing arguments now made by defendants to be unpersuasive.

All plaintiffs have standing to file and pursue their complaints.

2. Whether the CUA, with the exception of subdivision (d) thereof, and the MMP are preempted by the Supremacy Clause, by the C$A, and/or by the Single Convention.

As the United States Supreme Court has stated:

> The *Supremacy Clause* [of the United States Constitution] unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate or dire those necessities may be.
>
> *Gonzales v. Raich* (2005) 545 U.S. 1, 29 (citations omitted).

As the California Supreme Court has stated:

> The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. An important corollary of this rule, often noted and applied by the United States Supreme Court, is that *"[w]hen Congress legislates in field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manfesl purpose of Congress.'"* . . . [T]his venerable presumption "provides assurance that 'the federal-state balance,' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts."

> *Bronco Wine Co. v. Jolly (2004)* 33 Cal. 14th 943, 956-57 (citations omitted; emphasis in original).

21 U.S.C. § 903, which all parties acknowledge applies here, provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.*
>
> (Emphasis added.)

The State convincingly rebuts County of San Diego's argument that the CUA and MMP are preempted because they "authorize" conduct that federal law prohibits. The State is correct that the test is whether the CUA or MMP *requires* conduct that violates federal law.

Plaintiffs do not effectively rebut defendants' contention that if all the CUA and MMP do is remove penalties for the medicinal use of marijuana from *California's* drug laws, then there is no "positive conflict" between federal and "State law so that the two cannot consistently stand together."

Defendants persuasively argue that requiring the counties to issue identification cards for the purpose of identifying those whom California chooses not to arrest and prosecute for certain activities involving marijuana does not create a "positive conflict" for purposes of 21 U.S.C. § 903.

However, section 11362.78 effectively *requires* state and local law enforcement officials to "accept" the identification cards. It appears that "accepting" the card is for purposes of the prohibition set forth in section 11362.71(e). Section 11362.71 (e) provides:

> *No person* or designated primary caregiver in possession of a valid identification card *shall be subject to arrest* for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.
>
> (Emphasis added.)[3]

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[3] The broad language of section 11362.71(e) contrasts with the more specific language of (unchallenged) section 11362.5(d), which refers specifically to two California statutes, i.e., "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana." Section 11362.71 (e) also contrasts with sections 11362.765 and 11362.775, which refer specifically to California statutes, i.e., "Section 11357, 11358, 11359, 11360, 11366.5, or 11570."

To the extent the MMP purports to prohibit arrest for violation of the CSA's regulation of "'possession, transportation, delivery, or cultivation of medical marijuana," the MMP does not, as defendants argue, merely "remov[e] marijuana use by the seriously ill from the scope of state penalties;" and to that extent, there is a "positive conflict" with the CSA. However, this Court, guided by *People v. Superior Court (Rornero)* (1996) 13 Cal.4th 497, 509, construes sections 11 362.71(e) and 11362.78 as prohibiting arrest under California, not federal, laws for "possession, transportation, delivery, or cultivation of medical marijuana."

Plaintiffs argue that the common law doctrine of "obstacle conflict" preemption applies, notwithstanding the existence of 21 U.S.C. § 903. The Court disagrees with that argument. However, even if the common law doctrine of "obstacle conflict" preemption did apply, there is, as explained by the State in its opposition, no such obstacle created by the CUA or the MMP.

As for the arguments made by plaintiffs regarding the Single Convention, the Court found defendants' arguments more persuasive.

Neither the CUA nor the MMP is preempted by the Supremacy Clause, by the CSA, or by the Single Convention.

3. Whether the MMP, in alleged contravention of section 10(c) of article II of the California Constitution, improperly "amends" the CUA, an initiative statute.

Section 10(c) of article II of the California Constitution provides:

> The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

Plaintiffs challenge the MMP under this section of the California Constitution. The issue is whether the MMP "amends" the CUA.

Guided by precedent, including that summarized in *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484-1486, the Court concludes the MMP does not amend the CUA.

The MMP creates a stand-alone and (from the perspective of the persons protected by the CUA) voluntary system. Most importantly, the MMP does not add to or take away from the CUA.

Further, although the Court's ruling does not turn on this point, when the voters passed Proposition 215 (which is codified in the CUA), they expressly stated that one of their purposes was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes ...." The MMP does not interfere with that purpose. The MMP also appears to be consistent with the voters' other two expressly stated purposes, i.e., "[t]o ensure that patients ind their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction," and "[t]o encourage the federal and state governments to implement a plan

to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Section 11362.5 (b)(1).)

In short, the Court upholds the Compassionate Use Act (which is the codification of Proposition 215, the initiative passed by the voters) and the MMP (statutes passed by the Legislature) against the challenges brought by plaintiffs herein.

C. Injunctive Relief.

Injunctive relief was requested by some of the parties, *i. e.*, by Patient Intervenors and by County of Merced and Sheriff Pazin.

On December 1, 2006, County of San Diego filed a memorandum of points and authorities regarding injunctive relief.

On November 30, 2006, County of Merced and Sheriff Pazin filed a joinder in the brief filed by County of San Diego regarding requests for injunctive relief. In that joinder, County of Merced and Sheriff Pazin stated they do "not intend to further pursue [their] cause of action for injunctive relief."

On December 1, 2006, County of San Bernardino and Sheriff Penrod filed a joinder in the brief filed by County of San Diego on December 1.

On December 1, 2006, Patient Intervenors filed their Supplemental Brief Regarding Injunctive Relief.

Having reviewed the aforementioned briefs filed on November 30 and December 1, 2006, the Court does

not grant any injunctive relief. The Court grants no injunctive relief to County of Merced and Sheriff Pazin because they no longer seek it and, moreover, they do not prevail here. The Court grants no relief to Patient Intervenors because, as they concede, "the issuance of an injunction would be premature at this time."

The Court neither opines now as to the propriety of any injunctive relief that may be sought in the future nor retains any extraordinary jurisdiction in this matter. If, in the future, any party concludes it would be jurisdictionally, procedurally and substantively proper for this Court to grant injunctive relief, they may apply for such relief; and the Court will consider the propriety of the application.

D. Requests For Judicial Notice.

The parties' requests for judicial notice are all unopposed and granted.

E. The Court's Rulings.

Plaintiffs' motions for judgment on the pleadings are denied. Defendants' motions for judgment on the pleadings are granted.

No injunctive relief is granted by this order.

The Attorney General's office is to prepare and submit a proposed judgment within thirty days, after giving all other counsel an opportunity to review it.

The Attorney General's office is to give notice of ruling in accordance with Code of Civil Procedure section 1019.5(a).

Dated: December 6, 2006 /s/
WILLIAM R. VITT, JR.
Judge of the Superior Court

APPENDIX C

COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIV. 1 - No. D050333

S166505

IN THE SUPREME COURT OF CALIFORNIA

En Banc

[Filed October 16, 2008]

COUNTY OF SAN DIEGO, et al., Plaintiffs and Appellants,	)
v.	)
SAN DIEGO NORML et al., Defendants and Respondents;	)
WENDY CHRISTAKES et al., Interveners and Respondents.	)

The petitions for review are denied.

GEORGE
Chief Justice

APPENDIX D

UNITED STATES CODE
TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
CONTROL AND ENFORCEMENT
INTRODUCTORY PROVISIONS

21 U.S.C. § 801. Congressional findings and declarations: controlled substances

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this title have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because--

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

21 U.S.C. § 812. Schedules of controlled substances

(a) Establishment. There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this title [enacted Oct. 27, 1970] and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required. Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) SCHEDULE II.

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) SCHEDULE III.

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) SCHEDULE IV.

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) SCHEDULE V.

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Initial schedules of controlled substances [Caution: For amended schedules, see 21 CFR Part 1308.]. Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 201 [*21 USCS § 811*], consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol [Alphacetylmethadol].
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.

(7) Betacetylmethadol.
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.
(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Dihydromorphine.
(9) Etorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.
(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.
(19) Nicomorphine.
(20) Normorphine.
(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and

salts of isomers is possible within the specific chemical designation:

(1) 3, 4-methylenedioxy amphetamine.
(2) 5-methoxy-3, 4-methylenedioxy amphetamine
(3) 3, 4, 5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2, 5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-piperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(17) Tetrahydrocannabinols.

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1),

except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

SCHEDULE III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.
(2) Phenmetrazine and its salts.
(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.
(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the

following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Anabolic steroids.

SCHEDULE IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.
(4) Ethchlorvynol.
(5) Ethinamate.
(6) Methohexital.
(7) Meprobamate.
(8) Methylphenobarbital.
(9) Paraldehyde.

(10) Petrichloral.
(11) Phenobarbital.

SCHEDULE V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.
(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.
(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.
(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

21 U.S.C. § 823. Registration requirements

(a) Manufacturers of controlled substances in schedule I or II. The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

(b) Distributors of controlled substances in schedule I or II. The Attorney General shall register an applicant to distribute a controlled substance in schedule I or II unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

(c) Limits of authorized activities. Registration granted under subsections (a) and (b) of this section shall not entitle a registrant to (1) manufacture or distribute controlled substances in schedule I or II other than those specified in the registration, or (2) manufacture any quantity of those controlled substances in excess of the quota assigned pursuant to section 306 [*21 USCS § 826*].

(d) Manufacturers of controlled substances in schedule III, IV, or V. The Attorney General shall register an applicant to manufacture controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule III, IV, or V compounded therefrom into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture, distribution, and dispensing of controlled substances, and the existence in the establishment of effective controls against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

(e) Distributors of controlled substances in schedule III, IV, or V. The Attorney General shall register an applicant to distribute controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

(f) Research by practitioners; pharmacies; research applications; construction of Article 7 of the Convention on Psychotropic Substances. The Attorney General shall register practitioners (including pharmacies, as distinguished from pharmacists) to

dispense, or conduct research with, controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense, or conduct research with respect to, controlled substances under the laws of the State in which he practices. The Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Separate registration under this part [*21 USCS §§ 821* et seq.] for practitioners engaging in research with controlled substances in schedule II, III, IV, or V, who are already registered under this part [*21 USCS §§ 821* et seq.] in another capacity, shall not be required. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall

consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 304(a) [*21 USCS § 824(a)*]. Article 7 of the Convention on Psychotropic Substances shall not be construed to prohibit, or impose additional restrictions upon, research involving drugs or other substances scheduled under the convention which is conducted in conformity with this subsection and other applicable provisions of this title.

(g) Practitioners dispensing narcotic drugs for narcotic treatment; annual registration; separate registration; qualifications.

(1) Except as provided in paragraph (2), practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment shall obtain annually a separate registration for that purpose. The Attorney General shall register an applicant to dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment (or both)--

(A) if the applicant is a practitioner who is determined by the Secretary to be qualified (under standards established by the Secretary) to engage in the treatment with respect to which registration is sought;

(B) if the Attorney General determines that the applicant will comply with standards established by the Attorney General respecting (i) security of stocks of narcotic drugs for such treatment, and (ii) the

maintenance of records (in accordance with section 307 [*21 USCS § 827*]) on such drugs; and

(C) if the Secretary determines that the applicant will comply with standards established by the Secretary (after consultation with the Attorney General) respecting the quantities of narcotic drugs which may be provided for unsupervised use by individuals in such treatment.

(2)

(A) Subject to subparagraphs (D) and (J), the requirements of paragraph (1) are waived in the case of the dispensing (including the prescribing), by a practitioner, of narcotic drugs in schedule III, IV, or V or combinations of such drugs if the practitioner meets the conditions specified in subparagraph (B) and the narcotic drugs or combinations of such drugs meet the conditions specified in subparagraph (C).

(B) For purposes of subparagraph (A), the conditions specified in this subparagraph with respect to a practitioner are that, before the initial dispensing of narcotic drugs in schedule III, IV, or V or combinations of such drugs to patients for maintenance or detoxification treatment, the practitioner submit to the Secretary a notification of the intent of the practitioner to begin dispensing the drugs or combinations for such purpose, and that the notification contain the following certifications by the practitioner:

(i) The practitioner is a qualifying physician (as defined in subparagraph (G)).

(ii) With respect to patients to whom the practitioner will provide such drugs or combinations of drugs, the practitioner has the capacity to refer the patients for appropriate counseling and other appropriate ancillary services.

(iii) The total number of such patients of the practitioner at any one time will not exceed the applicable number. For purposes of this clause, the applicable number is 30, unless, not sooner than 1 year after the date on which the practitioner submitted the initial notification, the practitioner submits a second notification to the Secretary of the need and intent of the practitioner to treat up to 100 patients. A second notification under this clause shall contain the certifications required by clauses (i) and (ii) of this subparagraph. The Secretary may by regulation change such total number.

(iv) [Deleted]

(C) For purposes of subparagraph (A), the conditions specified in this subparagraph with respect to narcotic drugs in schedule III, IV, or V or combinations of such drugs are as follows:

(i) The drugs or combinations of drugs have, under the Federal Food, Drug, and Cosmetic Act [*21 USCS §§ 301* et seq.] or *section 351* of the Public Health Service Act [*42 USCS § 262*], been approved for use in maintenance or detoxification treatment.

(ii) The drugs or combinations of drugs have not been the subject of an adverse determination. For purposes of this clause, an adverse determination is a determination published in the Federal Register and made by the Secretary, after consultation with the Attorney General, that the use of the drugs or combinations of drugs for maintenance or detoxification treatment requires additional standards respecting the qualifications of practitioners to provide such treatment, or requires standards respecting the quantities of the drugs that may be provided for unsupervised use.

(D) (i) A waiver under subparagraph (A) with respect to a practitioner is not in effect unless (in addition to conditions under subparagraphs (B) and (C)) the following conditions are met:

(I) The notification under subparagraph (B) is in writing and states the name of the practitioner.

(II) The notification identifies the registration issued for the practitioner pursuant to subsection (f).

(III) If the practitioner is a member of a group practice, the notification states the names of the other practitioners in the practice and identifies the registrations issued for the other practitioners pursuant to subsection (f).

(ii) Upon receiving a notification under subparagraph (B), the Attorney General shall assign the practitioner involved an identification number under this paragraph for inclusion with the registration issued for the practitioner pursuant to subsection (f). The identification number so assigned shall be appropriate to preserve the confidentiality of patients for whom the practitioner has dispensed narcotic drugs under a waiver under subparagraph (A).

(iii) Not later than 45 days after the date on which the Secretary receives a notification under subparagraph (B), the Secretary shall make a determination of whether the practitioner involved meets all requirements for a waiver under subparagraph (B). If the Secretary fails to make such determination by the end of the such 45-day period, the Attorney General shall assign the physician an identification number described in clause (ii) at the end of such period.

(E) (i) If a practitioner is not registered under paragraph (1) and, in violation of the conditions specified in subparagraphs (B) through (D), dispenses narcotic drugs in schedule III, IV, or V or combinations of such drugs for maintenance treatment or detoxification treatment, the Attorney General may, for purposes of section 304(a)(4) [*21 USCS § 824(a)(4)*], consider the practitioner to have committed an act that renders the registration of the practitioner pursuant to subsection (f) to be inconsistent with the public interest.

(ii) (I) Upon the expiration of 45 days from the date on which the Secretary receives a notification under subparagraph (B), a practitioner who in good faith submits a notification under subparagraph (B) and reasonably believes that the conditions specified in subparagraphs (B) through (D) have been met shall, in dispensing narcotic drugs in schedule III, IV, or V or combinations of such drugs for maintenance treatment or detoxification treatment, be considered to have a waiver under subparagraph (A) until notified otherwise by the Secretary, except that such a practitioner may commence to prescribe or dispense such narcotic drugs for such purposes prior to the expiration of such 45-day period if it facilitates the treatment of an individual patient and both the Secretary and the Attorney General are notified by the practitioner of the intent to commence prescribing or dispensing such narcotic drugs.

(II) For purposes of subclause (I), the publication in the Federal Register of an adverse determination by the Secretary pursuant to subparagraph (C)(ii) shall (with respect to the narcotic drug or combination involved) be considered to be a notification provided by the Secretary to practitioners, effective upon the expiration of the 30-day period

beginning on the date on which the adverse determination is so published.

(F) (i) With respect to the dispensing of narcotic drugs in schedule III, IV, or V or combinations of such drugs to patients for maintenance or detoxification treatment, a practitioner may, in his or her discretion, dispense such drugs or combinations for such treatment under a registration under paragraph (1) or a waiver under subparagraph (A) (subject to meeting the applicable conditions).

(ii) This paragraph may not be construed as having any legal effect on the conditions for obtaining a registration under paragraph (1), including with respect to the number of patients who may be served under such a registration.

(G) For purposes of this paragraph:

(i) The term "group practice" has the meaning given such term in section 1877(h)(4) of the Social Security Act [*42 USCS § 1395nn(h)(4)*].

(ii) The term "qualifying physician" means a physician who is licensed under State law and who meets one or more of the following conditions:

(I) The physician holds a subspecialty board certification in addiction psychiatry from the American Board of Medical Specialties.

(II) The physician holds an addiction certification from the American Society of Addiction Medicine.

(III) The physician holds a subspecialty board certification in addiction medicine from the American Osteopathic Association.

(IV) The physician has, with respect to the treatment and management of opiate-dependent patients, completed not less than eight hours of training (through classroom situations, seminars at professional society meetings, electronic

communications, or otherwise) that is provided by the American Society of Addiction Medicine, the American Academy of Addiction Psychiatry, the American Medical Association, the American Osteopathic Association, the American Psychiatric Association, or any other organization that the Secretary determines is appropriate for purposes of this subclause.

(V) The physician has participated as an investigator in one or more clinical trials leading to the approval of a narcotic drug in schedule III, IV, or V for maintenance or detoxification treatment, as demonstrated by a statement submitted to the Secretary by the sponsor of such approved drug.

(VI) The physician has such other training or experience as the State medical licensing board (of the State in which the physician will provide maintenance or detoxification treatment) considers to demonstrate the ability of the physician to treat and manage opiate-dependent patients.

(VII) The physician has such other training or experience as the Secretary considers to demonstrate the ability of the physician to treat and manage opiate-dependent patients. Any criteria of the Secretary under this subclause shall be established by regulation. Any such criteria are effective only for 3 years after the date on which the criteria are promulgated, but may be extended for such additional discrete 3-year periods as the Secretary considers appropriate for purposes of this subclause. Such an extension of criteria may only be effectuated through a statement published in the Federal Register by the Secretary during the 30-day period preceding the end of the 3-year period involved.

(H)(i) In consultation with the Administrator of the Drug Enforcement Administration, the Administrator of the Substance Abuse and Mental

Health Services Administration, the Director of the National Institute on Drug Abuse, and the Commissioner of Food and Drugs, the Secretary shall issue regulations (through notice and comment rulemaking) or issue practice guidelines to address the following:

(I) Approval of additional credentialing bodies and the responsibilities of additional credentialing bodies.

(II) Additional exemptions from the requirements of this paragraph and any regulations under this paragraph.

Nothing in such regulations or practice guidelines may authorize any Federal official or employee to exercise supervision or control over the practice of medicine or the manner in which medical services are provided.

(ii) Not later than 120 days after the date of the enactment of the Drug Addiction Treatment Act of 2000 [enacted Oct. 17, 2000], the Secretary shall issue a treatment improvement protocol containing best practice guidelines for the treatment and maintenance of opiate-dependent patients. The Secretary shall develop the protocol in consultation with the Director of the National Institute on Drug Abuse, the Administrator of the Drug Enforcement Administration, the Commissioner of Food and Drugs, the Administrator of the Substance Abuse and Mental Health Services Administration and other substance abuse disorder professionals. The protocol shall be guided by science.

(I) During the 3-year period beginning on the date of approval by the Food and Drug Administration of a drug in schedule III, IV, or V, a State may not preclude a practitioner from dispensing or prescribing such drug, or combination of such drugs, to patients

for maintenance or detoxification treatment in accordance with this paragraph unless, before the expiration of that 3-year period, the State enacts a law prohibiting a practitioner from dispensing such drugs or combinations of drug [drugs].

(J) (i) This paragraph takes effect on the date referred to in subparagraph (I), and remains in effect thereafter.

(ii) For purposes relating to clause (iii), the Secretary and the Attorney General may, during the 3-year period beginning on the date of the enactment of the Office of National Drug Control Policy Reauthorization Act of 2006 [enacted Dec. 29, 2006], make determinations in accordance with the following:

(I) The Secretary may make a determination of whether treatments provided under waivers under subparagraph (A) have been effective forms of maintenance treatment and detoxification treatment in clinical settings; may make a determination of whether such waivers have significantly increased (relative to the beginning of such period) the availability of maintenance treatment and detoxification treatment; and may make a determination of whether such waivers have adverse consequences for the public health.

(II) The Attorney General may make a determination of the extent to which there have been violations of the numerical limitations established under subparagraph (B) for the number of individuals to whom a practitioner may provide treatment; may make a determination of whether waivers under subparagraph (A) have increased (relative to the beginning of such period) the extent to which narcotic drugs in schedule III, IV, or V or combinations of such drugs are being dispensed or possessed in violation of this Act; and may make a determination of whether

such waivers have adverse consequences for the public health.

(iii) If, before the expiration of the period specified in clause (ii), the Secretary or the Attorney General publishes in the Federal Register a decision, made on the basis of determinations under such clause, that subparagraph (B)(iii) should be applied by limiting the total number of patients a practitioner may treat to 30, then the provisions in such subparagraph (B)(iii) permitting more than 30 patients shall not apply, effective 60 days after the date on which the decision is so published. The Secretary shall in making any such decision consult with the Attorney General, and shall in publishing the decision in the Federal Register include any comments received from the Attorney General for inclusion in the publication. The Attorney General shall in making any such decision consult with the Secretary, and shall in publishing the decision in the Federal Register include any comments received from the Secretary for inclusion in the publication.

(h) Applicants for distribution of list I chemicals. The Attorney General shall register an applicant to distribute a list I chemical unless the Attorney General determines that registration of the applicant is inconsistent with the public interest. Registration under this subsection shall not be required for the distribution of a drug product that is exempted under clause (iv) or (v) of section 102(39)(A) [*21 USCS § 802(39)(A)*]. In determining the public interest for the purposes of this subsection, the Attorney General shall consider--

(1) maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) compliance by the applicant with applicable Federal, State, and local law;

(3) any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) such other factors as are relevant to and consistent with the public health and safety.

21 U.S.C. § 829. Prescriptions

(a) Schedule II substances. Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [*21 USCS §§ 301* et seq.], may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act [*21 USCS § 353(b)*]. Prescriptions shall be retained in conformity with the requirements of section 307 of this *title [21 USCS § 827]*. No prescription for a controlled substance in schedule II may be refilled.

(b) Schedule III and IV substances. Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription

drug as determined under the Federal Food, Drug, and Cosmetic Act [*21 USCS § 301* et seq.], may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act [*21 USCS § 353(b)*]. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

(c) Schedule V substances. No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

(d) Non-prescription drugs with abuse potential. Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act [*21 USCS §§ 301* et seq.] should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto.

(e) Controlled substances dispensed by means of the Internet [Caution: This subsection takes effect 180 days after enactment of Act Oct. 15, 2008, P.L. 110-425, as provided by § 3(j) of such Act, which appears as *21 USCS § 802* note.].

(1) No controlled substance that is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [*21 USCS §§ 301* et seq.] may be delivered, distributed, or dispensed by means of the Internet without a valid prescription.

(2) As used in this subsection:

(A) The term "valid prescription" means a prescription that is issued for a legitimate medical

purpose in the usual course of professional practice by--

(i) a practitioner who has conducted at least 1 in-person medical evaluation of the patient; or

(ii) a covering practitioner.

(B) (i) The term "in-person medical evaluation" means a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals.

(ii) Nothing in clause (i) shall be construed to imply that 1 in-person medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(C) The term "covering practitioner" means, with respect to a patient, a practitioner who conducts a medical evaluation (other than an in-person medical evaluation) at the request of a practitioner who--

(i) has conducted at least 1 in-person medical evaluation of the patient or an evaluation of the patient through the practice of telemedicine, within the previous 24 months; and

(ii) is temporarily unavailable to conduct the evaluation of the patient.

(3) Nothing in this subsection shall apply to--

(A) the delivery, distribution, or dispensing of a controlled substance by a practitioner engaged in the practice of telemedicine; or

(B) the dispensing or selling of a controlled substance pursuant to practices as determined by the Attorney General by regulation, which shall be consistent with effective controls against diversion.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [*21 USCS § 849, 859, 860*, or *861*], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl—[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be

sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [*21 USCS § 849, 859, 860,* or *861*] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5

years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of

section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [*21 USCS § 812* note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a

mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to

exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs,

marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [*21 USCS § 844*] and *section 3607 of title 18, United States Code*.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $ 500,000 if the defendant is an individual; or

(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in *section 16 of title 18, United States Code* (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally–

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [*21 USCS § 830*], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the

making of records or filing of reports under that section is not required; shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined.

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from

engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [*21 USCS § 830*]) shall, except to the extent that paragraph (12), (13), or (14) of section 402(a) [*21 USCS § 842(a)*] applies, be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [*21 USCS § 830*] have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs.

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser; shall be fined under this title or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of title 5, United States Code [*5 USCS § 553*], to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this Act:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this Act.

(iii) A person or entity providing documentation that establishes the name, address,

and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this Act.

(h) Offenses involving dispensing of controlled substances by means of the Internet [Caution: This subsection takes effect 180 days after enactment of Act Oct. 15, 2008, P.L. 110-425, as provided by § 3(j) of such Act, which appears as *21 USCS § 802* note.].

(1) In general. It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this title; or

(B) aid or abet (as such terms are used in *section 2 of title 18, United States Code*) any activity described in subparagraph (A) that is not authorized by this title.

(2) Examples. Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 303(f) [*21 USCS § 823(f)*] (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or

dispensation by means of the Internet in violation of section 309(e) [*21 USCS § 829(e)*];

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections 303(f) or 309(e) [*21 USCS § 823(f)* or *829(e)*];

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 311 [*21 USCS § 831*].

(3) Inapplicability.

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this title;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 [*47 USCS § 231*]); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except

that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 [*47 USCS § 230(c)*] shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation. Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

21 USCS § 844

§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this *title [21 USCS § 823]* or section 1008 of title III [*21 USCS § 958*] if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base

in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $ 1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $ 2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $ 5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture

or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) [Repealed]

(c) "Drug or narcotic offense" defined. As used in this section, the term " drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.

21 U.S.C. § 903. Application of State law

No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

California Health & Safety Code

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a

physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

11362.7. For purposes of this article, the following definitions shall apply:

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility

licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions

under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that document identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).
(2) Anorexia.
(3) Arthritis.
(4) Cachexia.
(5) Cancer.
(6) Chronic pain.
(7) Glaucoma.
(8) Migraine.
(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.
(10) Seizures, including, but not limited to, seizures associated with epilepsy.
(11) Severe nausea.
(12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as

defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

11362.71. (a) (1) The department shall establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program.

(2) The department shall establish and maintain a 24-hour, toll-free telephone number that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of an identification card issued by the department, until a cost-effective Internet Web-based system can be developed for this purpose.

(b) Every county health department, or the county's designee, shall do all of the following:

(1) Provide applications upon request to individuals seeking to join the identification card program.

(2) Receive and process completed applications in accordance with Section 11362.72.

(3) Maintain records of identification card programs.

(4) Utilize protocols developed by the department pursuant to paragraph (1) of subdivision (d).

(5) Issue identification cards developed by the department to approved applicants and designated primary caregivers.

(c) The county board of supervisors may designate another health-related governmental or nongovernmental entity or organization to perform the functions described in subdivision (b), except for an entity or organization that cultivates or distributes marijuana.

(d) The department shall develop all of the following:

(1) Protocols that shall be used by a county health department or the county's designee to implement the responsibilities described in subdivision (b), including, but not limited to, protocols to confirm the accuracy of information contained in an application and to protect the confidentiality of program records.

(2) Application forms that shall be issued to requesting applicants.

(3) An identification card that identifies a person authorized to engage in the medical use of

marijuana and an identification card that identifies the person's designated primary caregiver, if any. The two identification cards developed pursuant to this paragraph shall be easily distinguishable from each other.

(e) No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

(f) It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.

11362.715. (a) A person who seeks an identification card shall pay the fee, as provided in Section 11362.755, and provide all of the following to the county health department or the county's designee on a form developed and provided by the department:

(1) The name of the person, and proof of his or her residency within the county.

(2) Written documentation by the attending physician in the person' s medical records stating that the person has been diagnosed with a serious medical condition and that the medical use of marijuana is appropriate.

(3) The name, office address, office telephone number, and California medical license number of the person's attending physician.

(4) The name and the duties of the primary caregiver.

(5) A government-issued photo identification card of the person and of the designated primary caregiver, if any. If the applicant is a person under 18 years of age, a certified copy of a birth certificate shall be deemed sufficient proof of identity.

(b) If the person applying for an identification card lacks the capacity to make medical decisions, the application may be made by the person's legal representative, including, but not limited to, any of the following:

(1) A conservator with authority to make medical decisions.

(2) An attorney-in-fact under a durable power of attorney for health care or surrogate decisionmaker authorized under another advanced health care directive.

(3) Any other individual authorized by statutory or decisional law to make medical decisions for the person.

(c) The legal representative described in subdivision (b) may also designate in the application an individual, including himself or herself, to serve as a primary caregiver for the person, provided that the individual meets the definition of a primary caregiver.

(d) The person or legal representative submitting the written information and documentation described in subdivision (a) shall retain a copy thereof.

11362.72. (a) Within 30 days of receipt of an application for an identification card, a county health department or the county's designee shall do all of the following:

(1) For purposes of processing the application, verify that the information contained in the application is accurate. If the person is less than 18 years of age, the county health department or its designee shall also contact the parent with legal authority to make medical decisions, legal guardian, or other person or entity with legal authority to make medical decisions, to verify the information.

(2) Verify with the Medical Board of California or the Osteopathic Medical Board of California that the attending physician has a license in good standing to practice medicine or osteopathy in the state.

(3) Contact the attending physician by facsimile, telephone, or mail to confirm that the medical records submitted by the patient are a true and correct copy of those contained in the physician's office records. When contacted by a county health department or the county' s designee, the attending physician shall confirm or deny that the contents of the medical records are accurate.

(4) Take a photograph or otherwise obtain an electronically transmissible image of the applicant and of the designated primary caregiver, if any.

(5) Approve or deny the application. If an applicant who meets the requirements of Section 11362.715 can establish that an identification card is needed on an emergency basis, the county or its designee shall issue a temporary identification card that shall be valid for 30 days from the date of issuance. The county, or its designee, may extend the temporary identification card for no more than 30 days at a time, so long as the applicant continues to meet the requirements of this paragraph.

(b) If the county health department or the county's designee approves the application, it shall, within 24 hours, or by the end of the next working day of approving the application, electronically transmit the following information to the department:

(1) A unique user identification number of the applicant.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(c) The county health department or the county's designee shall issue an identification card to the applicant and to his or her designated primary caregiver, if any, within five working days of approving the application.

(d) In any case involving an incomplete application, the applicant shall assume responsibility for rectifying the deficiency. The county shall have 14 days from the

receipt of information from the applicant pursuant to this subdivision to approve or deny the application.

11362.735. (a) An identification card issued by the county health department shall be serially numbered and shall contain all of the following:

(1) A unique user identification number of the cardholder.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(4) A 24-hour, toll-free telephone number, to be maintained by the department, that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of the card.

(5) Photo identification of the cardholder.

(b) A separate identification card shall be issued to the person's designated primary caregiver, if any, and shall include a photo identification of the caregiver.

11362.74. (a) The county health department or the county's designee may deny an application only for any of the following reasons:

(1) The applicant did not provide the information required by Section 11362.715, and upon notice of the deficiency pursuant to subdivision (d) of

Section 11362.72, did not provide the information within 30 days

(2) The county health department or the county's designee determines that the information provided was false.

(3) The applicant does not meet the criteria set forth in this article.

(b) Any person whose application has been denied pursuant to subdivision (a) may not reapply for six months from the date of denial unless otherwise authorized by the county health department or the county's designee or by a court of competent jurisdiction.

(c) Any person whose application has been denied pursuant to subdivision (a) may appeal that decision to the department. The county health department or the county's designee shall make available a telephone number or address to which the denied applicant can direct an appeal.

11362.745. (a) An identification card shall be valid for a period of one year.

(b) Upon annual renewal of an identification card, the county health department or its designee shall verify all new information and may verify any other information that has not changed.

(c) The county health department or the county's designee shall transmit its determination of approval or denial of a renewal to the department.

11362.755. (a) The department shall establish application and renewal fees for persons seeking to obtain or renew identification cards that are sufficient to cover the expenses incurred by the department, including the startup cost, the cost of reduced fees for Medi-Cal beneficiaries in accordance with subdivision (b), the cost of identifying and developing a cost-effective Internet Web-based system, and the cost of maintaining the 24-hour toll-free telephone number. Each county health department or the county's designee may charge an additional fee for all costs incurred by the county or the county's designee for administering the program pursuant to this article.

(b) Upon satisfactory proof of participation and eligibility in the Medi-Cal program, a Medi-Cal beneficiary shall receive a 50 percent reduction in the fees established pursuant to this section.

11362.76. (a) A person who possesses an identification card shall:

(1) Within seven days, notify the county health department or the county's designee of any change in the person's attending physician or designated primary caregiver, if any.

(2) Annually submit to the county health department or the county' s designee the following:

(A) Updated written documentation of the person's serious medical condition.

(B) The name and duties of the person's designated primary caregiver, if any, for the forthcoming year.

(b) If a person who possesses an identification card fails to comply with this section, the card shall be deemed expired. If an identification card expires, the identification card of any designated primary caregiver of the person shall also expire.

(c) If the designated primary caregiver has been changed, the previous primary caregiver shall return his or her identification card to the department or to the county health department or the county's designee.

(d) If the owner or operator or an employee of the owner or operator of a provider has been designated as a primary caregiver pursuant to paragraph (1) of subdivision (d) of Section 11362.7, of the qualified patient or person with an identification card, the owner or operator shall notify the county health department or the county's designee, pursuant to Section 11362.715, if a change in the designated primary caregiver has occurred.

11362.765. (a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.

(b) Subdivision (a) shall apply to all of the following:

(1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.

(2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

(3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.

(c) A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360.

11362.77. (a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also

maintain no more than six mature or 12 immature marijuana plants per qualified patient.

(b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient' s medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may

possess amounts of marijuana consistent with this article.

11362.775. Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

11362.78. A state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently.

11362.785. (a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.

(b) Notwithstanding subdivision (a), a person shall not be prohibited or prevented from obtaining and submitting the written information and documentation necessary to apply for an identification card on the basis that the person is incarcerated in a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained.

(c) Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner or a person under arrest who has an identification card, to use marijuana for medical purposes under circumstances that will not endanger the health or safety of other prisoners or the security of the facility.

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

11362.79. Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances:

(a) In any place where smoking is prohibited by law.

(b) In or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence.

(c) On a schoolbus.

(d) While in a motor vehicle that is being operated.

(e) While operating a boat.

11362.795. (a) (1) Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is

allowed to use medical marijuana while he or she is on probation or released on bail.

(2) The court's decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court.

(3) During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.

(4) The court's consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

(b) (1) Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana pursuant to Section 11362.5 may request that he or she be allowed to use medical marijuana during the period he or she is released on parole. A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

(2) During the period of the parole, where a physician recommends that the parolee use medical marijuana, the parolee may request a modification of the conditions of the parole to authorize the use of medical marijuana.

(3) Any parolee whose request to use medical marijuana while on parole was denied may pursue an administrative appeal of the decision. Any decision on the appeal shall be in writing and shall reflect the reasons for the decision.

(4) The administrative consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

11362.8. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based solely on the fact that the licensee has performed acts that are necessary or appropriate to carry out the licensee's role as a designated primary caregiver to a person who is a qualified patient or who possesses a lawful identification card issued pursuant to Section 11362.72. However, this section shall not apply to acts performed by a physician relating to the discussion or recommendation of the medical use of marijuana to a patient. These discussions or recommendations, or both, shall be governed by Section 11362.5.

11362.81. (a) A person specified in subdivision (b) shall be subject to the following penalties:

(1) For the first offense, imprisonment in the county jail for no more than six months or a fine not to exceed one thousand dollars ($1,000), or both.

(2) For a second or subsequent offense, imprisonment in the county jail for no more than one year, or a fine not to exceed one thousand dollars ($1,000), or both.

(b) Subdivision (a) applies to any of the following:

(1) A person who fraudulently represents a medical condition or fraudulently provides any material misinformation to a physician, county health department or the county's designee, or state or local law enforcement agency or officer, for the purpose of falsely obtaining an identification card.

(2) A person who steals or fraudulently uses any person's identification card in order to acquire, possess, cultivate, transport, use, produce, or distribute marijuana.

(3) A person who counterfeits, tampers with, or fraudulently produces an identification card.

(4) A person who breaches the confidentiality requirements of this article to information provided to, or contained in the records of, the department or of a county health department or the county's designee pertaining to an identification card program.

(c) In addition to the penalties prescribed in subdivision (a), any person described in subdivision (b) may be precluded from attempting to obtain, or obtaining or using, an identification card for a period of up to six months at the discretion of the court.

(d) In addition to the requirements of this article, the Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996.

11362.82. If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof.

11362.83. Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.